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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NO. 88-_____

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioner

v.

LEROY JACKSON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the constitutional grant of admiralty jurisdiction to the federal government and the enactment of the exclusive federal administrative remedies in the Longshoremen's & Harbor Workers' Compensation Act have such a pre-emptive effect that they completely displace all state law, including a purported state cause of action for the bad-faith exercise of the federal right to controvert a longshoreman's claim for compensation.

2. Whether, in an area completely pre-empted by the United States Constitution and the Longshoremen's & Harbor Workers' Compensation Act, a federal court may make an authoritative pronouncement of the exclusivity of federal rights by declaration or injunction following an award by an Administrative Law Judge without violating the Anti-Injunction Act.

3. Whether a federal court may declare that the United States Constitution and the Longshoremen's & Harbor Workers' Compensation Act pre-empt a state court suit seeking actual and punitive damages for an alleged bad-faith exercise of the federal right to controvert a longshoreman's claim.

4. Whether a declaration or an injunction against a state court action seeking actual and punitive damages for an alleged bad-faith controversion of a longshoreman's claim under the Longshoremen's & Harbor Workers' Compensation Act falls within the exceptions in the Anti-Injunction Act for protecting or effectuating federal judgments or for expressly authorized injunctions.

II

LIST OF ALL PARTIES

The parties are Texas Employers' Insurance Association and Leroy Jackson.

Texas Employers' Insurance Association is affiliated with Employers Casualty Company and Employers National Life Insurance Co.

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v.

LEROY JACKSON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texas Employers' Insurance Association petitions for a writ of certiorari and asks this Court to reverse the judgment of the court of appeals and affirm the judgment of the district court.

OPINIONS BELOW

The opinion of the district court is reported at 618 F. Supp. 1316 (E.D. Tex. 1985). The opinion of the Fifth Circuit panel is reported at 820 F.2d 1406 (5th Cir. 1987). The Fifth Circuit's en banc opinion is not yet reported in the official reporter. Copies of all the opinions are reprinted in Part 2 of the Appendix.

STATEMENT OF JURISDICTION

The court of appeals, sitting en banc, rendered its judgment on December 13, 1988. A copy of the judgment appears in Part 3a of the Appendix.

The statutory provisions conferring jurisdiction are as follows: 28 U.S.C. § 1331 (the federal-question statute) and 28 U.S.C. § 1254 (review of decisions of the courts of appeals by writ of certiorari).

CONSTITUTIONAL PROVISION AND STATUTES AT ISSUE

THE UNITED STATES CONSTITUTION

Article III, section 2, clause 1:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .

THE ANTI-INJUNCTION ACT, 28 U.S.C. § 2283 (1982):

Stay of State court proceedings.

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

THE LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT, 33 U.S.C. §§ 901-50 (1982):

The voluminous portions of the Longshore Act that are at issue in this case are reprinted in Part 1 of the Appendix. The sections of the Act that are primarily at issue are the following:

33 U.S.C. § 905:

Exclusiveness of liability.

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . .

33 U.S.C. § 914:

Payment of compensation.

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

STATEMENT OF THE CASE

A chronology of the pertinent events appears in the Appendix at 145a.

The Petitioner, Texas Employers' Insurance Association (TEIA), is an insurance company authorized to issue policies of insurance under the Longshoremen's & Harbor Workers' Compensation Act (the Longshore Act). TEIA issued a Longshore Act policy to the employer of Mr. Leroy Jackson.

The Respondent, Mr. Leroy Jackson, was working as a longshoreman in July of 1978, when he sustained an on-the-job injury compensable under the Longshore Act. TEIA's policy of insurance was in effect on the date of Mr. Jackson's injury.

Mr. Jackson filed a claim against TEIA arising out of his July 1978 injury. TEIA controverted the claim.

(App. at 147a) For the next several years, TEIA paid benefits that corresponded with Mr. Jackson's periodic absence from work. In May of 1984, Mr. Jackson's claim went to formal hearing before Administrative Law Judge (ALJ) Ellin M. O'Shea. In September of that year, the ALJ issued a final Decision and Order, adjudging Mr. Jackson to be totally and permanently disabled and awarding him lifetime benefits. (App. at 185a)

Before that award was made, however, Mr. Jackson had sued TEIA in a district court of the State of Texas. In his state court suit, Mr. Jackson alleged that TEIA had acted in bad faith by suspending his benefits prior to the formal hearing. (App. at 211a) TEIA contested the state court's power to adjudicate Mr. Jackson's bad-faith claim by filing a plea in bar, which the state court heard and denied.

TEIA then brought suit, invoking federal-question jurisdiction, in the United States District Court for the Eastern District of Texas, Beaumont Division, seeking a declaratory judgment under 28 U.S.C. § 2201 and further seeking a temporary and permanent injunction. In support of the relief it requested, TEIA alleged that the states have no power to regulate the manner in which the Longshore Act is administered.

On August 8, 1985, District Judge Howell Cobb conducted a hearing on TEIA's request for declaratory and injunctive relief.

On August 21, 1985, Judge Cobb rendered an order declaring that Mr. Jackson's remedies were available exclusively under the Longshore Act and that the ALJ's order was res judicata of any claims for bad-faith refusal to pay compensation benefits. (App. at 141a) In addi-

tion, Judge Cobb enjoined Mr. Jackson from further prosecuting his state court action. On October 1, 1985, Judge Cobb issued his memorandum opinion, which included an order that permanently enjoined Mr. Jackson from prosecuting his state court suit and declaring that the Longshore Act pre-empts any state causes of action arising from the handling of compensation claims under the Longshore Act. 618 F. Supp. (App. at 121a)

Mr. Jackson appealed both the August and September rulings. His appeals were consolidated in the United States Court of Appeals for the Fifth Circuit.

On July 15, 1987, a panel of the court of appeals rendered its judgment and issued an opinion. The panel affirmed the declaratory judgment, finding that the Longshore Act pre-empted the causes of action asserted by Mr. Jackson in state court; and it vacated the injunction, finding that the injunction had not been permitted by the Anti-Injunction Act (28 U.S.C. § 2283). 820 F.2d 1406. (App. at 139a)

Dissenting from the panel opinion was Judge Edith Jones. Judge Jones questioned the existence of federal jurisdiction under the well-pleaded complaint doctrine. 820 F.2d at 1422-24. (App. at 110a-115a) Judge Jones further expressed the opinion that the federal courts should abstain from interfering with a pending state court suit. *Id.* at 1425-26. (App. at 118a-119a)

The court of appeals granted a rehearing en banc and heard arguments in January of 1988. On December 13, 1988, the Fifth Circuit Court of Appeals, sitting en banc, issued its judgment and opinion, vacating the district court's judgment and dismissing the case in its entirety.

(App. at 137a) The court of appeals held that the Anti-Injunction Act barred TEIA's injunctive relief and that a declaratory judgment was likewise barred as being tantamount to an injunction.

Chief Judge Charles Clark reluctantly concurred in the opinion. He felt compelled to abide by precedent but saw no wisdom in the court's ruling. (App. at 65a)

Judge Alvin B. Rubin also concurred specially in the opinion. In part I of his concurrence, Judge Rubin, like Chief Judge Clark, said that he was compelled to abide by controlling precedent. (App. at 66a) In part II of his concurrence, Judge Rubin noted the undesirability of allowing state courts to decide issues of federal law when there is no meaningful review by the United States Supreme Court owing to the end of mandatory appellate review and the volume of petitions for certiorari that are directed each year to the Court. Judge Rubin called on Congress to amend the Anti-Injunction Act and urged this Court to re-evaluate the federal abstention doctrine. (App. at 66a-67a) Judges Sam D. Johnson, John R. Brown, and Jerre S. Williams joined in part II of Judge Rubin's concurrence.

Senior Judge John R. Brown dissented from the en banc opinion, and Judge Jerre S. Williams joined in that dissent. Senior Judge Brown expressed the opinion that a declaratory judgment was both proper and necessary to protect the unique and powerful pre-emption emanating from "the impeccably federal province of admiralty jurisdiction" under the United States Constitution and the Longshore Act. (App. at 73a)

REASONS FOR GRANTING THE WRIT

1. THE EXCLUSIVE FEDERAL ADMINISTRATIVE REMEDIES CREATED BY THE LONGSHORE ACT AND PROTECTED BY THE CONSTITUTION FROM STATE INTERFERENCE WILL BE JEOPARDIZED IF EMPLOYERS AND CARRIERS MUST RISK A STATE COURT SUIT FOR PUNITIVE DAMAGES WHENEVER THEY EXERCISE THEIR FEDERAL RIGHT TO CONTEST A LONGSHOREMAN'S CLAIM FOR COMPENSATION BENEFITS.

2. GIVEN THE ELIMINATION OF THE SUPREME COURT'S MANDATORY APPELLATE JURISDICTION, THERE IS A COMPELLING NEED FOR THIS COURT TO DEFINE THE PROPER SCOPE OF THE ANTI-INJUNCTION ACT AND ITS RELATIONSHIP TO DECLARATORY RELIEF IN THE CONTEXT OF A CONSTITUTIONALLY PROTECTED FEDERAL INTEREST SO PREDOMINATING THAT IT COMPLETELY PRE-EMPTS STATE LAW.

3. THIS COURT MUST DETERMINE HOW THE ANTI-INJUNCTION ACT SHOULD BE APPLIED WHEN THERE IS COMPLETE PRE-EMPTION UNDER THE PRINCIPLES OF THIS COURT'S DECISIONS IN *AVCO*, *PILOT LIFE*, AND *METROPOLITAN LIFE* AND WHEN THERE IS NO LEGITIMATE STATE INTEREST ENTITLED TO COMITY.

4. THIS COURT NEEDS TO DETERMINE WHETHER THE ANTI-INJUNCTION ACT PERMITS A FEDERAL COURT TO "PROTECT OR EFFECTUATE" AN ADMINISTRATIVE DECREE ISSUED UNDER THE LONGSHORE ACT.

5. THIS COURT NEEDS TO CLARIFY THE APPLICATION OF THE "EXPRESSLY AUTHORIZED" EXCEPTION OF THE ANTI-INJUNCTION ACT IN THE CONTEXT OF THE LONGSHORE ACT.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The court below declined to confront TEIA's argument that Mr. Jackson's claims were pre-empted by the United States Constitution and the Longshore Act. The court simply applied the Anti-Injunction Act (28 U.S.C. § 2283) without any consideration of the nature of the asserted federal rights. This Court should grant certiorari to determine whether the pre-emptive quality of the Constitution and the Longshore Act is so powerful as to fall within the principles enunciated in *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists,* 390 U.S. 557 (1968); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987); and *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987). If that is true, then the Court should further determine whether the principles of comity underlying section 2283 would be offended by a declaration of the exclusive character of the federal remedies and whether an injunction to enforce the exclusive character of those remedies falls within the express exceptions of section 2283.

1. There is a unique and exclusively federal right at stake.

The United States Constitution prohibits the relief that Mr. Jackson is seeking in his state court suit—namely, the creation and enforcement under state law of a duty to controvert longshoremen's claims in good faith. In *Knickerbocker Ice Co. v. Stewart,* 253 U.S.

149 (1920), and *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924), this Court held unconstitutional acts of Congress that sought to place in the states the power to enact longshore compensation programs. *Accord Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917). Those decisions led Congress to adopt the Longshore Act, an exclusively federal compensation program that provides an administrative remedy. Mr. Jackson is attempting to superimpose on that federal administrative remedy what amounts to state judicial regulation of the manner in which carriers and employers conduct themselves before a federal agency. Such regulation is simply beyond the constitutional authority of the states.

Not all federal rights are created equal. The pre-emption in this case rests on a constitutional basis and is, therefore, stronger than the "complete" pre-emption that was found in *Avco, Pilot Life,* and *Metropolitan Life.* The complete pre-emption in those cases was purely statutory and was found to exist in areas where the states traditionally did have judicial and legislative power before Congress acted. In this case, pre-emption emanates from the United States Constitution as well as from the Longshore Act.

2. The Longshore Act establishes an exclusive administrative procedure that does not allow recovery for controverting a longshoreman's claim in bad faith.

The Longshore Act is statutory evidence of the underlying constitutional pre-emption. Section 5 of the Longshore Act states that the "liability of an employer pre-

scribed in section 904 of this title shall be exclusive." By those words, Congress expressly intended to bar additional remedies, including a suit for bad-faith claims practices. *Atkinson v. Gates, McDonald & Co.*, 838 F.3d 808 (5th Cir. 1988); *Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986).[1]

Under section 39 of the Act, the Secretary of Labor has the exclusive authority to administer the Act and is empowered to issue the detailed regulations that govern every aspect of the Act. *See generally* 20 C.F.R. pts. 701-03 (1984). Section 703.106 of those regulations permits the Department of Labor to revoke a carrier's authority to write Longshore Act coverage when there is a "lack of promptness in making payments when due," or when there are "attempts to offer to, or urge upon, claimants inequitable settlements." Mr. Jackson chose,

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1. *Accord Hall v. C & P Tel. Co.*, 793 F.2d 1354 (D.C. Cir. 1986), *on reh'g*, 809 F.2d 924 (D.C. Cir. 1987) (bad-faith suit barred by District of Columbia Workers' Compensation Act, which is identical to the Longshore Act); *cf. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (ERISA pre-empts a state law cause of action for bad-faith refusal to pay a claim under an ERISA-regulated benefit plan); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (states cannot "supplement" Death on the High Seas Act with additional elements of damages); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Hayes v. Prudential Life Ins. Co. of Am.*, 819 F.2d 921 (9th Cir. 1987) (Federal Employee Health Benefits pre-empts any state law tort for the bad-faith handling of an FEHBA claim), *cert. denied*, ____U.S.____ (1988); *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985) (Longshore Act pre-empts a retalitory discharge action). *But see Martin v. Travelers Ins. Co.*, 497 F.2d 329 (1st Cir. 1974) (allowing bad-faith suit despite Longshore Act's exclusivity provision).

That exclusivity of remedy applies to the carrier as well as to the employer. *Johnson v. American Mut. Liab. Ins. Co.*, 559 F.2d 382 (5th Cir. 1977); Longshoremen's & Harbor Workers' Compensation Act § 35, 33 U.S.C. § 935 (1982).

not to petition the Secretary of Labor to revoke TEIA's license, but to file suit in state court for damages, a remedy not contemplated by Congress.

In addition to its express pre-emption, the Longshore Act impliedly pre-empts the remedy that Mr. Jackson seeks. *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta,* 458 U.S. 141 (1982). By penalizing the untimely payment of compensation,[2] Congress has effectively pre-empted additional penalties under state law. As the Ninth Circuit has said, "the remedies that [Congress] has made available for use against employers [and carriers] who act in bad faith bear on the question of whether federal courts ought to create . . . the remedy sought here." *Sample v. Johnson,* 771 F.2d 1335, 1346 (9th Cir. 1985), *cert. denied,* 475 U.S. 1019 (1986).

Mr. Jackson's attempt to impose a good-faith limitation on the right of a carrier or employer to controvert a longshoreman's claim is further pre-empted because it irreconcilably conflicts with the Longshore Act. *See Fidelity Fed. Sav. & Lona Ass'n v. De La Cuesta,* 458 U.S. 141 (1982). The Act plainly has no such limitation. *See* Longshoremen's & Harbor Workers' Compensation

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2. Under § 14(e) there is a 10% penalty for the untimely payment of compensation due prior to an award of an ALJ. Under § 14(f) there is a 20% penalty for the untimely payment of compensation due under an award. Under § 14(a), the employer can prevent the imposition of the § 14(e) penalty by filing a controversion.

Congress clearly views §§ 14(e) and 14(f) as penalties for nonpayment. When considering a new criminal penalty for bad-faith denial of benefits, the House of Representatives noted that the "Committee bill enhances *other penalty provisions of the current Longshore Act.*" H. Rep. No. 570, 98th Cong., 1st Sess. 17 (1983) (emphasis added). (App. at 162a)

Act § 14(a), 33 U.S.C. § 914(a) (1982) (hereinafter cited LHWCA).

Congress rejected the request of organized labor to add a good-faith limitation on controversion. During the hearings that led to the 1984 Amendments to the Longshore Act, Congress reviewed evidence about the widespread problem of fraudulent claims, including claims that were being orchestrated by organized crime. *See Waterfront Corruption: Hearing Before the Permanent Subcommittee on Investigations, Senate Governmental Affairs Comm.*, 97th Cong., 1st Sess. (1981). Representatives of organized labor countered that abuse of the claims process was to be found, not only in the rank and file, but also among representatives of employers and carriers. The gist of their complaints was that employers were controverting claims in order to "forc[e] [claimants] to accept settlements far below their proper entitlements."[3] Mr. Jackson levies the same charge in his state court suit.

Congress responded to organized labor's protests, not by adding a good-faith limitation on the right to controvert. Instead, Congress added a criminal penalty for any agent of an employer or an insurance carrier "who willfully makes a false statement or representation for the purpose of denying or terminating benefits to an injured employee." *See* LHWCA § 31(c), 33 U.S.C. § 931(c) (1986). The intent of the new penalty, when added with the like penalty for making a fraudulent

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3. *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor, Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 516 (1981) (hereinafter cited as *1981 Senate Hearings*). (App. at 165a)

claim, was to "curb potential abuses of the system by all parties, resulting in the prompt disposition of all deserving claims."[4]

3. There is a compelling need for an authoritative pronouncement of federal law in order to protect the administrative procedure established by the Longshore Act.

Mr. Jackson and claimants like him argue, in effect, that Congress has opted to allow the fifty states to impose fifty potentially different regulatory schemes upon the Longshore Act, some of which would create duties for employers and carriers that contradict the plain language of the Act. Mr. Jackson's state law claim presents an excellent example of the conflicts that would occur. Whereas section 14 of the Longshore Act provides that, after controversion, an employer and a carrier have an absolute right to suspend benefits until a formal hearing is held, Mr. Jackson says that Texas state courts can require the employer and carrier to exercise their federal right only in conformity with a jury's hindsight notion of "good faith."

Under that reasoning, juries in Texas—and each of the remaining forty-nine states—would be empowered to define exactly what "good faith" means within their state boundaries. Hence, the rights and liabilities of employers and carriers under the Longshore Act would

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4. S. Rep. No. 81, 98th Cong., 1st Sess. 37 (1983). (App. at 163a) To the same effect was the House Report. H. Rep. No. 570, 98th Cong., 1st Sess. 17 (1983). (App. at 162a-163a)

be subject to the idiosyncratic but unassailable[5] interpretations of fifty jurisdictions, with the inevitable result of conflicting regulations that would vary from case to case even within each jurisdiction.

Moreover, TEIA faces immediate and irreparable harm in being forced to litigate in a Texas state court the propriety of the manner in which it conducted itself before a federal agency. The very pendency of such a civil action—and the likelihood of others—presents a substantial and immediate threat to the integrity of the exclusively federal administrative system that exists under the Longshore Act. Further, Mr. Jackson's state court action may be a harbinger of future attempts by private litigants in state courts to regulate the conduct of parties that are pursuing a variety of other federal administrative remedies.

The purpose of the Longshore Act is to provide an inexpensive and expeditious *administrative* framework to resolve the claims of injured employees. That purpose is undermined by the very existence of state court punitive damage suits for wrongful controversion. It is no answer to say that employers and carriers can present their federal defenses in state courts. If employers and carriers were forced to defend state court actions predicated on the alleged tortious refusal to pay Longshore Act bene-

5. If, as Mr. Jackson proposes, the state tort action arises out of state law, it is obvious that federal courts would have no power to override the state courts' interpretations of the state law. Thus, we would have the paradoxical situation of the states placing an interpretation on the Longshore Act that the federal courts could not alter.

fits,[6] the exclusivity of the Longshore Act would be irreparably destroyed. That damage would occur in spite of—and, ironically, because of—the ability to litigate through the state judicial system.

Analogous to those points is *Hendley v. Central of Georgia Railroad,* 609 F.2d 1146 (5th Cir. 1980), *cert. denied,* 449 U.S. 1093 (1981). Mr. Hendley had been helping a co-employee prepare an FELA case. Such assistance is protected from employer retaliation by the FELA. Mr. Hendley succeeded in enjoining a disciplinary proceeding against him on the ground that it was an instance of employer retaliation barred by the FELA. It was no answer that Mr. Hendley could object to the illegality of the disciplinary hearing at the time of the hearing itself. Even if he had won at the hearing level, the purpose of the federal statute would have already been frustrated.

The legislative history of the 1984 Amendments to the Longshore Act highlights the impact of allowing longshoremen to threaten and bring state court suits for punitive damages over the manner in which employers and carriers handle their claims. Soon after the 1972 Amendments, lawmakers realized that the cost to em-

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6. The prospect of other suits is by no means fanciful. Denying TEIA relief would encourage many more suits than those already filed. *See, e.g., Atkinson v. Gates, McDonald & Co.,* 838 F.2d 808 (5th Cir. 1988); *Warbington v. Aetna Casualty & Surety Co.,* 659 F. Supp. 267 (S.D. Miss. 1986); *Povlish v. TEIA,* No. 86-4719-C (94th Judicial District, Nueces County, Texas) (case pending); *Duncan v. I.T.O. Corp.,* No. H-85-5731, (S.D. Tex.) (dism'd May 22, 1986); *Fields v. Home Ins. Co.,* No. H-85-5678 (S.D. Tex.) (removed from state court; dism'd Feb. 28, 1986); *Calhoun v. Employers Nat'l Ins. Co.,* No. S85-1372(NG), (S.D. Miss.) (dism'd June 27, 1986); *De la Cerda v. U. S. Fire Ins. Co.,* No. B-85-957-CA, E.D. Tex.) (dism'd Nov. 22, 1985).

ployers of providing benefits under the Act far exceeded any expectations.[7] The staggering increases were described as follows by one senator:

> When the act was first amended in 1972, it became a free ticket to rip off the consumer and the taxpayer. So much so that in the 5 years after the changes were made, reported injuries jumped 185 percent. The chart to my right clearly shows that as benefits skyrocketed, the number of claims shot up right along with them. In 1972, 72,000 claims were filed. That number jumped to over 205,000 by 1977, meaning that nearly 1 in 5 employees filed a claim.[8]

The outrageous increase in costs led to three problems: (1) many shippers were avoiding U.S. ports and were using Canadian ports where the compensation rates were cheaper, (2) as a result of declining business in U.S. ports, employees were being laid off and maritime employers were going out of business, and (3) high compensation costs were increasing the prices that American consumers had to pay.[9]

If Mr. Jackson and claimants like him are able to threaten and file state court suits seeking punitive damages for alleged bad-faith refusals to pay their claims, then the cost of compensation will again increase. Be-

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7. *1981 Senate Hearings, supra* note 3, at 1 (noting a 551% increase in benefits after the 1972 Amendments). (App. at 159a) *See* S. Rep. No. 81, 98th Cong., 1st Sess. 20-21, 33 (1983).

8. *1981 Senate Hearings, supra* note 3, at 1. (App. at 157a).

9. *1981 Senate Hearings, supra note* 3, at 2-3. (App. at 160a-161a).

cause of the *in terrorem* effect of suits for punitive damages, employers and carriers will be reluctant to withhold payment prior to the ALJ's award. The resulting increase in the cost of compensation will lead to the same disastrous effects on U.S. shipping that prompted the 1984 Amendments to the Longshore Act.

By his state court suit, Mr. Jackson seeks to enable elected judges in Texas to usurp the role of making national policy. That effort ignores the national debate that led to the constitutional grant of exclusive federal jurisdiction over admiralty matters, and it ignores the national debate over the Longshore Act by which Congress has balanced the competing interests in a matter of national interest.[10]

Such a state of affairs would jeopardize the Longshore Act. To prevent such a result, this Court should render, in the words of dissent below, "an authoritative pronouncement of federal law by a federal court." (App. at 70a) Only this Court can provide an "authoritative pronouncement" of the obvious: Under the principles of *Avco, Pilot Life,* and *Metropolitan Life,* Mr. Jackson's purported claims have been displaced by the Constitution and the Longshore Act so that his claims are exclusively federal and necessarily arise under federal law.

4. The federal courts have the power to declare the federal rights at stake.

The court of appeals decided that an injunction was barred by section 2283. The court then decided that a

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10. *See* 128 Cong. Rec. 18017 (1982) (statement of Sen. Nickles concerning proposed amendments to the Longshore Act: Congress has made "[e]very effort" to "balance the competing interests.").

declaratory judgment was likewise barred because it would be tantamount to an injunction.

There are, in fact, no opinions by this Court that decide the propriety of the declaratory judgment in this case, and this Court has not defined the precise effect of a declaratory judgment or its relationship to section 2283.[11] That is another reason for granting TEIA's petition. On the facts of this case, the Court should amplify its statements in *Steffel v. Thompson,* 415 U.S. 452 (1974), that "declaratory relief [is] . . . an alternative to the strong medicine of the injunction," 415 U.S. at 466, and that " '*different considerations* enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other,' " 415 U.S. at 469 (emphasis in original; quoting *Roe v. Wade,* 410 U.S. 113, 166 (1973)).

The language of section 2283 does not bar a declaratory judgment. Whether to allow the federal courts to declare the federal rights of state litigants is a matter that must be decided with regard to the principle of federal-state comity that the Anti-Injunction Act reflects.

The concept of comity implies reciprocity. Comity does not apply when the states have no power whatsoever. A declaratory judgment is proper in this case, despite a pending state suit, because there are no comity interests at stake. Because of the powerful pre-emptive force of the Constitution and the Longshore Act, there is no state power, judicial or legislative, to regulate the administration of

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11. *See Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Wooley v. Maynard,* 430 U.S. 705 (1977); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Steffel v. Thompson,* 415 U.S. 452, 478-858 (1974) (Rehnquist, J., concurring); *id.* at 476-78 (White, J., concurring); *Hawaii Housing Auth. v. Midkiff,* 463 U.S. 1323 (Rehnquist, J., Circuit Justice 1983).

the Longshore Act; and the Act itself displaces any exercise of state power. This situation will remain confused and unsatisfactory without clarification from this Court. As Chief Judge Charles Clark said in his concurrence below:

> [P]recedent compels this court to send the case to a court that, if it acts properly, may only dismiss. . . . I am at a loss to comprehend how this procedure can advance comity. Exalting the form of the anti-injunction act over the substance of preemption strips both comity and justice of their meaning. (App. at 65a)

Comity does not, therefore, bar the declaratory judgment below. The only rights at stake are federal rights, and they are not adequately protected by interpreting section 2283 to mean that federal courts cannot declare federal law but must defer to state courts even though the very existence of state litigation is constitutionally prohibited. As Judge Rubin stated in his concurrence below:

> The state court judgments in [federal-question] cases are subject to final review by the Supreme Court, but this remedy is no longer available by appeal. . . . [L]itigants must seek relief by application to the Court for a writ. Such writs are sparingly granted. . . . [T]he volume of litigation presented to the Court is now so large that the Court simply cannot adequately assure the protection of federal rights in those cases. (App. at 66a-67a)

Judge Rubin concluded that the "promised ultimate review" by this Court is "apt to be illusory." *Id.* He called on Congress to amend section 2283 and urged this Court to reassess the role of federal abstention.

TEIA shares Judge Rubin's concern and urges this Court to reassess the existing lower court precedents that automatically equate a declaratory judgment with an injunction in light of the following circumstances of this case: (1) there is federal pre-emption of constitutional proportions, (2) Mr. Jackson is asserting a state cause of action that does not exist and, had the court below faced the pre-emption issue, his claim would have been seen to be entirely federal in character, (3) Mr. Jackson is asserting that non-existent cause of action after receiving a full administrative adjudication of his exclusive federal remedy, (4) the very existence of Mr. Jackson's state court suit—and the likelihood of others—has a chilling effect on the exercise of the right of carriers and employers to controvert Longshore Act claims, (5) the harm of defending a claim barred by federal law will be suffered before TEIA could seek review by this Court of the final decision of the highest state court in Texas, and (6) that "promised review," in Judge Rubin's words, is "apt to be illusory" since mandatory appellate jurisdiction is no longer available. (App. at 67a)

Under those circumstances, it is error to say categorically that a declaratory judgment should not issue once a state suit has been filed. Holding to such a rule in this case would only cause carriers and employers to file a suit in federal court whenever they receive a demand letter threatening a bad-faith action for punitive damages. The result would be an unseemly race to the courthouse —carriers and employers to the federal court and claimants to the state court.

Given the powerful constitutional pre-emption in this case, the federal interest is extraordinarily high and

deserves to be protected, not eviscerated by a reading of section 2283 that makes no sense in light of the total absence of a legitimate state interest. The same thinking that led this Court to create exceptions in *Avco, Pilot Life,* and *Metropolitan Life* to the well-pleaded complaint rule and the strictures on removal jurisdiction are at work in this case and need definition and pronouncement by this Court in the context of section 2283.

5. The injunction below was necessary to protect and effectuate a federal judgment.

The exception in section 2283 for protecting and effectuating federal judgments is bound up with the concept of relitigation and naturally leads to a consideration of res judicata. Indeed, it is said to apply in the presence of res judicata or collateral estoppel. *Samuel C. Ennis & Co. v. Woodmar Realty Co.,* 542 F.2d 45, 49 (7th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977). The questions here are whether the decision of the ALJ was a federal judgment, and, if so, whether that judgment barred further litigation concerning TEIA's delay in paying compensation.

This Court has recognized the preclusive effect of administrative decisions. In *United States v. Utah Construction & Mining Co.,* 384 U.S. 394 (1966), a unanimous opinion holding that a decision of the Advisory Board of Contract Appeals was res judicata, the Court explained as follows:

> Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. . . . When an administrative agency is

> acting in a judicial capacity and resolves disputed issues of fact properly before it in which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce respose.

384 U.S. at 421-22. In *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), this Court further refined the federal common law of res judicata by deciding to treat state administrative decisions as final judgments. Given those holdings, there is no justification for excluding compensation orders from the "judgments" that federal courts may protect under the Anti-Injunction Act.

Certainly, no one would question the applicability of the relitigation exception if, under section 21 of the Longshore Act, the ALJ's compensation order had been enforced by a district court or affirmed by a court of appeals before TEIA sought an injunction against the inconsistent state court proceeding. That order should not be left unprotected merely because prior formal action by a federal court has not been undertaken. Such a prerequisite would lead to unnecessary judicial proceedings under the Longshore Act—in truth, a race to the courthouse—typically by a party who has no interest in litigating the order itself.

If a compensation order were not so viewed, then the administrative procedure of the Longshore Act would be rendered ineffective. No one would need to obey an ALJ's order because it would not be a binding and complete judgment. That is the logical result of Mr. Jackson's argument against the relitigation exception; and the logical extension of that argument will be to emasculate all decisions made by federal agencies. If the decision below

stands, any party to an administrative dispute may relitigate any matter in state court. It is not hard to envision state court suits seeking punitive damages for bad-faith denials of Social Security benefits, Veterans' benefits, and the like.

Given that Mr. Jackson's compensation order was a judgment under the Anti-Injunction Act, the remaining inquiry is whether that federal judgment is res judicata of Mr. Jackson's postulated state law claim for wrongful controversion, which is in fact constitutionally prohibited.

At issue here is claim preclusion, not issue preclusion. *See Parklane Hosiery Co. v. Shore,* 429 U.S. 322, 327 (1979). In addressing the subject of preclusion, the court of appeals never fully understood the nature of the ALJ's award under the Longshore Act. When a longshoreman proceeds to formal hearing, he is pursuing two claims. First is a claim for occupational disability. Second is a claim for delay in the payment of benefits. The remedy for that delay is the penalty imposed by section 14 for the pre-award failure to pay benefits when due. Section 14 includes as well the payment of prospective penalties in the event of a failure to abide by the final order. Thus, under section 14 of the Longshore Act, the question whether TEIA wrongfully withheld benefits was before the ALJ, it was within her jurisdiction, and a second litigation must be precluded.

Although Mr. Jackson formally raised his entitlement to penalties for bad-faith refusal to pay only in state court, any claim for wrongful controversion was before the ALJ. Mr. Jackson was able to litigate his right to bad-faith penalties before the ALJ. *E.g., Miller v. Central Dispatch, Inc.,* 16 B.R.B. Serv. 63 (1984)

(longshoreman argues, unsuccessfully, for bad-fatih damages before ALJ). That the ALJ would have rejected his claim—based upon a proper understanding of the exclusivity of the benefits provided by the Longshore Act —is no reason to ignore the res judicata effect of the ALJ's order. Whatever rights Mr. Jackson had to the payment of compensation under the Longshore Act, those rights were litigated once and for all in the administrative hearing. By virtue of the complete pre-emptive force of the constitution and the Longshore Act, no other rights existed to be litigated.

There is yet another analysis that leads to the applicability of the relitigation exception. If TEIA is correct in asserting that the pre-emption in this case is akin to, and even more powerful than, the complete pre-emption found in *Avco, Pilot Life,* and *Metropolitan Life,* then the only claim held by Mr. Jackson was a federal claim, and the only forum that Congress provided for its assertion was the formal hearing before the ALJ. That route having been exhausted, so is Mr. Jackson's cause of action. By definition, his attempt to sue in state court is an attempt to relitigate the already asserted federal claim and falls squarely within the relitigation exception. It is no answer to say that Mr. Jackson could not litigate his state claims before the ALJ, as suggested by the court below (App. at 47a-49a), because no such claims existed in light of the constitutional and statutory pre-emption at work in this case.

6. The injunction below was expressly authorized.

The majority of the court below held that the "expressly authorized" exception of section 2283 is inapplicable; it did so by distinguishing *Mitchum v. Foster,* 407 U.S. 225 (1972) (holding that an express authorization to

enjoin need not be stated in so many words within the four corners of the statute). (App. at 52a) The majority found *Mitchum* inapplicable primarily because the Longshore Act does not have legislative history equivalent to 42 U.S.C. § 1983. (App. at 52a)

That reasoning is further evidence of the deleterious consequences of the failure of the court of appeals to come to grips with the pre-emption issue. The majority opinion wholly ignored the judicial history that preceded the passage of the Longshore Act—namely, this Court's decisions in *Knickerbocker, Dawson,* and *Jensen,* which held that the states could not enact compensation programs for longshoremen, nor could Congress delegate that power to the state.[12] By virtue of those opinions, Congress knows that the states cannot interfere with the Longshore Act. It is, therefore, not surprising—and not important—that the congressional record is devoid of any debates about how to enjoin such unconstitutional interference with a federal administrative system that, contrary to the en banc opinion below, does represent a "uniquely federal right . . . that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Mitchum v. Foster,* 407 U.S. at 237.

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12. Senior Judge Brown does have an appreciation for the judicial history of the Longshore Act. *See* 820 F.2d at 1411 & n.4. (App. at 84a) Senior Judge Brown was described by Justice Douglas as the "leading admiralty authority" of the federal bench. *Chevron Oil Co. v. Huson,* 404 U.S. 97, 114 (1971) (Douglas, J., concurring).

CONCLUSION

The Court should grant TEIA's petition for a writ of certiorari and affirm the declaratory judgment and the injunction issued by the district court. TEIA asks for all other just relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of this petition for writ of certiorari were served on counsel for Mr. Leroy Jackson, Mr. Richard Schechter, Esq., 2010 Summit Tower, 11 Greenway Plaza,, Houston, Texas 77046, on February ———, 1989, by deposit in the U.S. mail, first-class postage prepaid. All parties to be served have been served.

REAGAN WM. SIMPSON
Counsel for Petitioner

APPENDIX

NO. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioner

v.

LEROY JACKSON,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Part 1: Pertinent Sections of The Longshore Act

§ 5 of The Longshore Act (33 U.S.C. § 905) Prior to 1984 Amendments

§ 905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the

vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(Mar. 4, 1927, ch. 509, § 5, 44 Stat. 1426; Oct. 27, 1972, Pub. L. 92-576, § 18(a), 86 Stat. 1263).

1984 Amendments to § 5 of The Longshore Act (33 U.S.C. § 905)

§ 905. Exclusiveness of liability

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependants, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not

plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees, only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The

remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(c) Outer Continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this chapter by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

(As amended Sept. 28, 1984, Pub. L. 98-426, §§ 4(b), 5(a)(1), (b), 98 Stat. 1641.)

§ 14 of The Longshore Act (33 U.S.C. § 914) Prior to the 1984 Amendments

§ 914. Payment of compensation

(a) Manner of payment

Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) Period of installment payments

The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Notification of commencement or suspension of payment

Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) Right to compensation controverted

If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) Additional compensation for overdue installment payments payable without award

If any installment of compensation payable without

an award is not paid within fourteen days after it becomes due, as provided in subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) Additional compensation for overdue installment payments payable under terms of award

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

(g) Notice of payment; penalty

Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the Secretary, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy com-

missioner within such time the Secretary shall assess against such employer a civil penalty in the amount of $100.

(h) Investigations, examinations, and hearings for controverted, stopped, or suspended payments

The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

(i) Deposit by employer

Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.

(j) Discharge of employer's liability for compensation

Whenever the deputy commissioner determines that it is in the interest of justice, the liability of the employer for compensation, or any part thereof as determined by the deputy commissioner with the approval of the Secretary, may be discharged by the payment of a lump sum

equal to the present value of future compensation payments commuted, computed at 4 per centum true discount compounded annually. The probability of the death of the injured employee or other person entitled to compensation before the expiration of the period during which he is entitled to compensation shall be determined in accordance with the American Experience Table of Mortality, and the probability of the remarriage of the surviving wife shall be determined in accordance with the remarriage tables of the Dutch Royal Insurance Institution. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

(k) Reimbursement for advance payments

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(l) Receipt for payment

An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

1984 Amendments to § 14 of the Longshore Act (33 U.S.C. § 914)

§ 914. Payment of compensation

(b) Period of installment payments

The first installment of compensation shall become due

on the fourteenth day after the employer has been notified pursuant to section 912 of this title, or the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(j) Reimbursement for advance payments

If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(k) Receipt for payment

An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

(l) Redesignated (k)

(As amended Sept. 28, 1984, Pub. L. 98-426, §§ 13, 27 (a)(2), 98 Stat. 1649, 1654.)

§ 18 of The Longshore Act (33 U.S.C. § 918) Prior to the 1984 Amendments

§ 918. Collection of defaulted payments; special fund

(a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is

payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The

court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

(b) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made under this chapter, and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits, including the right of lien and priority provided for by section 917 of this title, as against the employer and may by a proceeding in the name of the Secretary of Labor under this section or under subsection (c) of section 921 of this title, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

(Mar. 4, 1927, ch. 509, § 18, 44 Stat. 1434; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; July 26, 1956, ch. 735, § 6, 70 Stat. 655.)

1984 Amendments to § 18 of The Longshore Act (33 U.S.C. § 918)

§ 918. Collection of defaulted payments; special fund

(b) In cases where judgment cannot be satisfied by reason of the employer insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made under this chapter, and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits as against the employer and may by a proceeding in the name of the Secretary of Labor under this section or under subsection (c) of section 921 of this title, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

(As amended Sept. 28, 1984, Pub. L. 98-426, § 27(b), 98 Stat. 1654.)

§ 21 of The Longshore Act (33 U.S.C. § 921) Prior to the 1984 Amendments

§ 921. Review of compensation orders

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subsection (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman.

(2) For the purpose of carrying out its functions under this chapter, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision

under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable any-

where in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or mak-

ing an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

(Mar. 4, 1927, ch. 509, § 21, 44 Stat. 1436; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Oct. 27, 1972, Pub. L. 92-576; § 15(a), (b), 86 Stat. 1261, 1262; March 27, 1978, Pub. L. 95-251, § 2(a)(10), 92 Stat. 183.)

1984 Amendments to § 21 of The Longshore Act (33 U.S.C. § 921)

§ 921. Review of compensation orders

(b) Benefits Review Board; establishment; members, chairman; quorum; voting; questions reviewable; record conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secre-

tary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(As amended Sept. 28, 1984, Pub. L. 98-426, § 15, 98 Stat. 1649.)

§ 22 of The Longshore Act (33 U.S.C. § 922) Prior to the 1984 Amendments

§ 922. Modification of awards

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year

after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

(Mar. 4, 1927, ch. 509, § 22, 44 Stat. 1437; May 26, 1934, ch. 354, § 5, 48 Stat. 807; June 25, 1938, ch. 685, § 10, 52 Stat. 1167.)

29 C.F.R. § 18.54(c)

§ 18.54 Closing the record.

(c) Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record. However, the administrative law judge shall make part of the record, any motions for attorney fees authorized by statutes, and any supporting documentation, any determinations thereon, and any approved correction to the transcript.

§ 31 of The Longshore Act (33 U.S.C. § 931) Prior to the 1984 Amendments

§ 931. Penalty for misrepresentation

Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining any benefit or payment under this chapter shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not to exceed $1,000 or by imprisonment of not to exceed one year, or by both such fine and imprisonment.

(Mar. 4, 1927, ch. 509, § 31, 44 Stat. 1439.)

1984 Amendments to § 31 of The Longshore Act (33 U.S.C. § 931)

§ 931. Penalty for misrepresentation

(a) Felony; fine; imprisonment

(1) Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this chapter shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

(2) The United States attorney for the district in which the injury is alleged to have occurred shall make every reasonable effort to promptly investigate each complaint made under this subsection.

(b) List of persons disqualified from representing claimants

(1) No representation fee of a claimant's representative shall be approved by the deputy commissioner, an administrative law judge, the Board, or a court pursuant to section 928 of this title, if the claimant's representative is on the list of individuals who are disqualified from representing claimants under this chapter maintained by the Secretary pursuant to paragraph (2) of this subsection.

(2)(A) The Secretary shall annually prepare a list of those individuals in each compensation district who have represented claimants for a fee in cases under this chapter and who are not authorized to represent claimants. The names of individuals contained on the list required under this subparagraph shall be made available to employees and employers in each compensation district through posting and in such other forms as the Secretary may prescribe.

(B) Individuals shall be included on the list of those not authorized to represent claimants under this chapter if the Secretary determines under this section, in accordance with the procedure provided in subsection (j) of section 907 of this title, that such individual—

(i) has been convicted (without regard to pending appeal) of any crime in connection with the representation of a claimant under this chapter or any workers' compensation statute;

(ii) has engaged in fraud in connection with the presentation of a claim under this or any workers' compensation statute, including, but not limited to, knowingly making false representations, concealing or attempting to conceal material facts with respect

to a claim, or soliciting or otherwise procuring false testimony;

(iii) has been prohibited from representing claimants before any other workers' compensation agency for reasons of professional misconduct which are similar in nature to those which would be grounds for disqualification under this paragraph; or

(iv) has accepted fees for representing claimants under this chapter which were not approved, or which were in excess of the amount approved pursuant to section 928 of this title.

(C) Notwithstanding subparagraph (B), no individual who is on the list required to be maintained by the Secretary pursuant to this section shall be prohibited from presenting his or her own claim or from representing without a fee, a claimant who is a spouse, mother, father, sister, brother, or child of such individual.

(D) A determination under subparagraph (A) shall remain in effect for a period of not less than three years and until the Secretary finds and gives notice to the public that there is reasonable assurance that the basis for the determination will not reoccur.

(3) No employee shall be liable to pay a representation fee to any representative whose fee has been disallowed by reason of the operation of this paragraph.

(4) The Secretary shall issue such rules and regulations as are necessary to carry out this section.

(c) False statements or representation to reduce, deny, or terminate benefits

A person including, but not limited to, an employer, his duly authorized agent, or an employee of an insurance

carrier who knowingly and willfully makes a false statement or representation for the purpose of reducing, denying, or terminating benefits to an injured employee, or his dependents pursuant to section 909 of this title if the injury results in death, shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

(As amended Sept. 28, 1984, Pub. L. 98-426, § 19, 98 Stat. 1650.)

§ 35 of The Longshore Act (33 U.S.C. § 935 (1982)) Unchanged by the 1984 Amendments

§ 935. Substitution of carrier for employer

In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this chapter may be most effectively discharged by the employer, and in order that the administration of this chapter in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect to such liability, imposed by this chapter upon the employer, as it considers proper in order to effectuate the provisions of this chapter. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the Board, or the Secretary, or any court under this chapter shall be jurisdiction of the carrier, and (3) any requirement by a deputy commissioner, the Board, or the Secretary, or any court under any compensation order, finding, or decision shall be

binding upon the carrier in the same manner and to the same extent as upon the employer.

(Mar. 4, 1927, ch. 509, § 35, 44 Stat. 1441; Oct. 27, 1972, Pub. L. 92-576, § 15(i), 86 Stat. 1262.)

§ 39 of The Longshore Act (33 U.S.C. § 939) Unchanged by the 1984 Amendments

§ 939. Administration by Secretary

(a) Prescribing rules and regulations; appointing and fixing compensation of employees; making expenditures

Except as otherwise specifically provided, the Secretary shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisors, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with chapter 51 and subchapter III of chapter 53 of title 5, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subsection (a) of section 940 of this title) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this chapter. All expenditures of the Secretary in the administration of this chapter shall be allowed and paid as provided in section 945 of this title upon the presentation of itemized vouchers therefor approved by the Secretary.

(b) Establishing compensation districts

The Secretary shall establish compensation districts, to include the high seas and the areas within the United States to which this chapter applies, and shall assign to each such district one or more deputy commissioners, as the Secretary deems advisable. Judicial proceedings under sections 918 and 921 of this title in respect of any injury or death occurring on the high seas shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such District).

(c) Furnishing information and assistance; directing vocational rehabilitation

(1) The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

(2) The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation. The Secretary may in his

discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this chapter to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may, in his discretion, use the fund provided for in section 944 of this title in such amounts as may be necessary to procure such services, including necessary prosthetic appliance or other apparatus. This fund shall also be available in such amounts as may be authorized in annual appropriations for the Department of Labor for the costs of administering this subsection.

(Mar. 4, 1927, ch. 509, § 39, 44 Stat. 1442; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, §-32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972; July 26, 1956, ch. 735, § 7, 70 Stat. 656; Oct. 27, 1972, Pub. L. 92-576, § 17, 86 Stat. 1262.)

Part 2: Opinions Below

A. Opinion of the Fifth Circuit En Banc

TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Plaintiff-Appellee,

v.

Leroy JACKSON, Defendant-Appellant.

Nos. 85-2583, 85-2690.

United States Court of Appeals, Fifth Circuit.

Dec. 13, 1988.

Insurer brought action for declaratory judgment and injunction with respect to state court suit against it for bad-faith refusal to pay benefits under the Longshore and Harbor Workers' Compensation Act. The United States District Court for the Eastern District of Texas, Howell Cobb, J., 618 F.Supp. 1316, granted relief and injured worker appealed. The Court of Appeals, 820 F.2d 1406, affirmed in part and reversed in part. On rehearing, the Court of Appeals, Garwood, Circuit Judge, held that: (1) Anti-Injunction Act barred the action regardless of whether state court action was preempted, and (2) if Anti-Injunction Act would bar suit, that will also bar the issuance of a declaratory judgment which would have the same effect as an injunction.

Judgment reversed and cause ordered dismissed.

Clark, Chief Judge, filed an opinion concurring specially in the majority opinion and in the opinion of Alvin B. Rubin, Circuit Judge.

Alvin B. Rubin, Circuit Judge, filed an opinion in which Johnson, Circuit Judge, joined and in which Brown and Jerre S. Williams, Circuit Judges, joined in part.

Brown, Circuit Judge, filed an opinion dissenting in part and concurring in part in which Jerre S. Williams, Circuit Judge, joined.

Appeals from the United States District Court for the Eastern District of Texas.

ON SUGGESTION FOR REHEARING
EN BANC

(Opinion July 15, 1987, 5 Cir., 1987, 820 F.2d 1406)

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES and SMITH, Circuit Judges.*

GARWOOD, Circuit Judge:

This case involves the authority of a federal district court to enjoin the prosecution of a previously filed state court civil suit and declare the purported state law causes of action therein asserted preempted by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950.

The state suit was brought by appellant Leroy Jackson (Jackson, a workman who had been injured in the course of his LHWCA-covered employment, against appellee, Texas Employer's Insurance Association (TEIA), his employer's LHWCA insurer, seeking damages for mental

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* Judge King is recused, and therefore did not participate in this decision.

Judge John M. Duhe, Jr. was not a member of the Court when this case was submitted to the Court en banc and did not participate in this decision.

anguish, stress, and anxiety consequent on TEIA's alleged fraud and bad faith in having delayed payment of his LHWCA compensation benefits. Nearly a year later, TEIA filed this action against Jackson in the United States District Court for the Eastern District of Texas, seeking to enjoin Jackson's prosecution of the state suit and to declare that its claims were preempted by the LHWCA. Shortly before the state suit was scheduled to go to trial, the district court enjoined Jackson's prosecution of it and rendered the declaratory judgment that Jackson's state law claims were preempted by the LHWCA. *Texas Employers' Insurance Association v. Jackson,* 618 F.Supp. 1316 (E.D. Tex. 1985). Jackson appealed and a panel of this Court set aside the injunction as contrary to the Anti-Injunction Act, 28 U.S.C. § 2283,[1] but affirmed the grant of declaratory relief, which it held to be proper under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.[2] *Texas Employers' Insurance As-*

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1. Section 2283 provides:
"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

2. Section 2201(a) provides:
"(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."
Section 2202 provides:
"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

sociation v. Jackson, 820 F.2d 1406 (5th Cir. 1987). Agreeing with the former but not the latter determination, this Court en banc now holds that whether or not Jackson's claims were preempted by the LHWCA, the district court nevertheless lacked authority to issue the injunction by virtue of the Anti-Injunction Act, and that it and allied principles likewise prevented the declaratory relief sought and granted below. As the district court was not authorized to grant any of the relief sought by TEIA, we accordingly reverse the judgment below and order the case dismissed.

CONTEXT FACTS AND PRIOR PROCEEDINGS

In July 1978, Jackson injured his back and right ankle when he fell on a barge in navigable waters in the course of his employment as a shipfitter for Gulfport Shipbuilding Company (Gulfport) in Port Arthur, Texas. Jackson received medical treatment and returned to the same employment with Gulfport on October 30 of that year. Thereafter and until May 1982, Jackson continued his work as shipfitter for Gulfport, with intermittent absences from work and medical treatment on account of his July 1978 injury. On May 3, 1982, Jackson seriously reinjured his back in the course of the same employment with Gulfport, and he has not returned to work since. On July 6, 1982, Jackson filed a formal claim for total permanent disability benefits under the LHWCA. *See* 33 U.S.C. § 908.

Throughout all this time, Gulfport was an employer subject to the LHWCA, TEIA was Gulfport's LHWCA compensation insurer, and Jackson was a Gulfport employee covered by the Act. *See* 33 U.S.C. §§ 902(3), 902(4), 932(a)(1).

TEIA paid Jackson's medical expenses and temporary total LHWCA disability benefits until April 4, 1983, when it suspended payment. TEIA had previously, in late July 1982, filed a formal "controversion" of entitlement to benefits pursuant to 33 U.S.C. § 914(d) on the ground that the amount of permanent disability "is uncertain at this point" because Jackson had "not yet reached maximum improvement."[3] Payment of benefits remained suspended from April 4, 1983 until shortly after a July 6, 1983 informal conference before a deputy commissioner,[4] at which time TEIA agreed to resume payments. Jackson was medically reexamined in August 1983, and on September 14, 1983, TEIA again suspended payment of benefits and filed another controversion, this time on the ground that Jackson had reached maximum recovery and that any disability he had was not due to his injury but to an arthritic condition. Following a settlement conference at which a Department of Labor claims examiner recommended payment, TEIA, on September 29, 1983, again

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3. Section 914(d) provides in part:

> "If the employer controverts the right to compensation he shall file with the deputy commissioner . . . a notice in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, . . . and the grounds upon which the right to compensation is controverted."

Under section 914(a), LHWCA compensation is payable promptly and without an award, "except where liability to pay is controverted by the employer." Section 914(b) requires payment within fourteen days after the employer has knowledge of the injury and thereafter semimonthly. Section 914(e) provides:

> "If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section. . . ."

4. *See* 33 U.S.C. §§ 914(h), 919(c), 940.

filed another controversion objecting to that recommendation and continued to withhold benefits. Compensation remained unpaid until the final award was made in September 1984.

On May 3, 1984, Jackson's LHWCA claim was heard before a Department of Labor administrative law judge (ALJ) pursuant to 33 U.S.C. §§ 919 (c), (d), and (e). On September 14, 1984, the ALJ awarded Jackson disability benefits on account of his July 1978 and May 1982 injuries, holding that he had been totally and permanently disabled since May 3, 1982. Jackson was also granted preaward interest on accrued, unpaid benefits and attorneys' fees pursuant to 33 U.S.C. § 928(a).[5] This award was filed in the office of the deputy commissioner on September 28, 1984 and, neither party having appealed to the Benefits Review Board, became final and unappealable thirty days thereafter. 33 U.S.C. §§ 919(e), 921(a), 921(b) (appeal from the Benefits Review Board would have been to this Court; § 921(c)). TEIA promptly paid the award in full.

Meanwhile, on June 7, 1984, after the ALJ hearing but before her formal award, Jackson sued TEIA in the 60th District Court of Jefferson County, Texas. Jackson filed a First Amended Original Petition in that suit on May 1, 1985 and a Second Amended Original Petition on May 24, 1985. The suit alleged Jackson's July 1978 and May 1982 injuries and that these were covered by the LHWCA, with TEIA being the LHWCA insurance

5. Attorneys' fees are expressly provided for by section 928(a). Interest is not expressly provided for, but apparently has been routinely awarded. The ALJ's decision expressly notes that there was no objection to the award of attorneys' fees; nor does it indicate any objection to the interest award.

carrier of Jackson's employer, Gulfport. It sought damages, actual and exemplary, on account of "mental anguish, stress, anxiety and humiliation" suffered by Jackson as a result of TEIA's allegedly fraudulent and bad faith suspension of Jackson's LHWCA compensation benefits commencing in April 1983. Jackson alleged that TEIA knowingly induced a doctor to file a false medical report concerning him on the basis of which TEIA suspended his LHWCA benefits, and that TEIA knew he was entitled to such benefits but suspended payment solely in an effort to force him to settle for far less than his claim was worth, which pressures were especially severe as Jackson's LHWCA benefits were then his and his family's sole support. There was no allegation that Jackson ever did settle, or that he did not ultimately receive all he was entitled to under the LHWCA; nor was any recovery sought of any amounts allegedly due under the LHWCA. Jackson's state court pleadings purported to assert a cause of action against TEIA in respect to these alleged facts under seven different theories of Texas law, *viz.*: a claim for false, misleading, unfair and/or deceptive acts under Article 21.21 of the Texas Insurance Code; a claim under the Texas deceptive Trade Practices Act (Texas Business and Commerce Code §§ 17.41, *et seq.*); and claims under Texas common law theories of bad faith insurance practices, fraud, intentional infliction of severe emotional distress, negligent infliction of severe emotional distress, and willful and wanton lack of care and concern for the health, safety, and welfare of others.

TEIA filed a "plea in bar," plea in abatement, and answer in the state court action on July 19, 1984. The plea in bar asserted in substance that the LHWCA preempted Jackson's claims. The plea in abatement re-

quested abatement until the LHWCA proceedings were final. In its answer, TEIA asserted, in addition to a general denial, that Jackson was not a consumer under the Texas Deceptive Trade Practices Act, that neither that statute nor the Texas Insurance Code applied to the handling of LHWCA claims, and that the LHWCA was Jackson's exclusive remedy.

On January 11, 1985, the state trial court entered an order denying TEIA's plea in bar. Extensive discovery, including the taking of several depositions, ensued in the state court suit. It was set for trial for August 12, 1985, and later reset for August 26, 1985.

On May 23, 1985, TEIA filed the instant action against Jackson in the United States District Court for the Eastern District of Texas. The only relief sought was a preliminary and permanent injunction against Jackson's further prosecution of the state court suit, and declaratory judgment that the LHWCA preempts Jackson's state law claims asserted in his state court suit and that the ALJ's September 1984 award in the LHWCA proceeding had become final and constituted *res judicata* of those claims. A copy of the ALJ's September 14, 1984 opinion and award and of Jackson's First Amended Original Petition in the state court suit were attached as exhibits to TEIA's complaint.

On August 8, 1985, the court below held a nonevidentiary hearing on TEIA's requested injunction, and on August 21, 1985, issued a temporary injunction which enjoined Jackson from further prosecution of his state suit. Jackson timely appealed. On September 30, 1985, the district court permanently enjoined Jackson from further prosecution of the state court action and declared

that Jackson's claims asserted in the state suit were preempted by the LHWCA. Jackson again timely appealed, and his two appeals were consolidated in this Court.

[1, 2] In granting the injunction, the district court ruled that the September 1984 ALJ award barred Jackson's state suit under principles of *res judicata* and hence invoked the "to protect or effectuate its judgments" exception to the Anti-Injunction Act. It also ruled that the "as expressly authorized by Act of Congress" exception to the Anti-Injunction Act was applicable by reason of section 21(d) of the LHWCA, 33 U.S.C. § 921(d). 618 F.Supp. at 1323. The panel rejected both these determinations, and held that the Anti-Injunction Act was applicable and barred the grant of injunctive relief. 820 F.2d at 1415-17.[6] We agree. The panel also held, however, that the Declaratory Judgment Act was available and that resort to it was not precluded by the Anti-Injunction Act or related principles. 820 F.2d at 1420-21 (Judge Jones dissented from this holding, 820 F.2d at 1424-26). On the merits, the panel ruled that the LHWCA preempted Jackson's state law claims. 820 F.2d at 1411-14.[7] However, as explained below, we hold that

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6. The remaining exception to the Anti-Injunction Act, the "where necessary in aid of its jurisdiction" exception, has not been urged by TEIA, was not relied on by the district court, and appears plainly unavailable. *See, e.g., Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511, 75 S. Ct. 452, 457, 99 L.Ed. 600 (1955); *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 97 S. Ct. 2881, 2893, 53 L.Ed.2d 1009 (1977); *T. Smith & Son, Inc. v. Williams,* 275 F.2d 397, 407 (5th Cir. 1960). When TEIA filed its suit, the ALJ's award had long since been paid in full and become final by lack of appeal, and no federal court had even potential jurisdiction over the ALJ's award or Jackson's claim for LHWCA benefits.

7. Jackson relied on *Martin v. Travelers Insurance Co.,* 497 F.2d 329 (1st Cir. 1974), in arguing that his state law claims were not preempted by the LHWCA. The panel declined to follow *Martin.*

regardless of any LHWCA preemption, the Anti-Injunction Act and allied principles prevent declaratory as well as injunctive relief respecting Jackson's pending and previously filed state suit.[8]

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820 F.2d at 1414. In a later decision, another panel of this Court likewise declined to follow *Martin* and held that a state law cause of action for bad faith failure to pay LHWCA compensation when due was preempted by the LHWCA. *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 *rehg. en banc denied*, 844 F.2d 788 (5th Cir. 1988). Our holding concerning the Anti-Injunction Act and the Declaratory Judgment Act implies no disagreement with *Atkinson*, which remains the law of this Circuit unless overruled by subsequent contrary pronouncement of the Supreme Court or of this Court en banc.

The Texas law claims asserted by Jackson are of the general type later recognized by the Texas Supreme Court in *Aranda v. Insurance Company of North America*, 748 S.W.2d 210 (Tex. 1988), which upheld a common-law action against an insurer for its bad faith in failing to timely pay benefits due under the Texas Workers' Compensation Act. In so holding, and in finding the action was not precluded by the Texas Workers' Compensation Act, *Aranda* in part relied on the "contractural nature of" the Texas Workers' Compensation Act and on the fact that "[t]he employee is thus a party to the [compensation insurance] contract." *Id.* at 212.

8. The panel also held that the district court had jurisdiction over TEIA's suit under 28 U.S.C. § 1331 because of the preemptive force of the LHWCA. 820 F.2d at 1417-20. Judge Jones dissented from this holding. *Id.* at 1422-24. The panel majority recognized that under the well-pleaded complaint rule, federal preemption is generally a defensive matter which does not give rise to federal question jurisdiction even in an action for declaratory judgment that a state law claim is preempted. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 2848, 2850, 77 L.Ed.2d 420 (1983). However, the panel majority held that here the LHWCA preemption was so pervasive and displacing as to bring the case within the rule of *Avco Corp. v. Aero Lodge No. 735, I.A. of M. & A.W.*, 390 U.S. 557, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968), and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987). Judge Jones, in her dissent, viewed this as an unwarranted extension of *Avco* and *Taylor*, and considered that the case was governed by *Franchise Tax Board, Caterpillar, Inc. v. Williams*, _____U.S._____, 107 S. Ct. 2425, 2429, 96 L.Ed.2d 318 (1987), *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173 (5th Cir. 1984), and related decisions.

INJUNCTION

General principles

Before considering the particular exception specified in the Anti-Injunction Act (note 1, *supra*), some general observations concerning it may be helpful. Justice Black in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 90 S. Ct. 1739, 26 L.Ed.2d 234 (1970), remarked on the significance of the Act, originally passed in 1793, to "the essentially federal nature of our national government," and explained:

> "When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. . . . One of the reserved powers was the maintenance of

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We need not and do not resolve this difficult issue, because we hold that even if the court below had jurisdiction and even if the LHWCA were completely preemptive, the district court nevertheless had no authority to enjoin prosecution of the previously filed and pending state action and declare its claims invalid, which was the *only* relief sought by TEIA's suit. Thus, regardless of how the jurisdictional issue is resolved, the result is exactly the same. While such pretermitting of a jurisdictional issue is rare, there is respected precedent for it in analogous circumstances. *See United States v. Augenblick,* 393 U.S. 348, 89 S. Ct. 528, 531, 21 L.Ed.2d 537 (1969) ("even if we assume, *arguendo,* that a collateral attack on a court-martial judgment may be made in the Court of Claims through a back-pay suit alleging a 'constitutional' defect in the military decision, these present cases on their facts do not rise to that level"); *Secretary of Navy v. Avrech,* 418 U.S. 676, 94 S. Ct. 3039, 3040, 41 L.Ed.2d 1033 (1974) (assuming, *arguendo,* that the court below had jurisdiction, on the merits there was no entitlement to relief, and so the jurisdictional issue is not decided); *Norton v. Mathews,* 427 U.S. 524, 96 S. Ct. 2771, 2775, 49 L.Ed.2d 672 (1976) ("[W]hichever disposition we undertake, the effect is the same. It follows that there is no need to decide the theoretical question of jurisdiction in this case. In the past, we similarly have reserved difficult questions of our jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.").

> state judicial systems for the decision of legal controversies. Many of the Framers of the Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights. Others felt that a complete system of federal courts to take care of federal legal problems should be provided for in the Constitution itself. This dispute resulted in compromise. One 'supreme Court' was created by the Constitution, and Congress was given the power to create other federal courts. . . .
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> "While the lower federal courts were given certain powers in the 1789 [Judiciary] Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. . . . Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. . . . Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work . . . , it was necessary to work out lines of demarcation between the two systems. . . . The 1793 anti-injunction Act was at least in part a response to these pressures." *Id.* 90 S. Ct. at 1742-43.

Hence, Justice Black concluded, the Act's "prohibition" of injunctions against state court proceedings "in part rests on the fundamental constitutional independence of the States and their courts." *Id.* 90 S. Ct. at 1743. More recently, the Court observed in a similar vein that section 2283 "is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts" and that its prohibi-

tions are "[d]ue in no small part to the fundamental constitutional independence of the States." *Chick Kam Choo v. Exxon Corp.*, ____U.S.____, 108 S. Ct. 1684, 1689, 100 L.Ed.2d 127 (1988). We, too, have recognized that, in the words of Judge Wisdom writing for a distinguished panel of this Court, "the hands-off doctrine expressed in Section 2283 is to be considered in the light of the function of Section 2283 as a pillar of federalism." *T. Smith & Son., Inc. v. Williams,* 275 F.2d 397, 407 (5th Cir. 1960) (Tuttle, Brown, and Wisdom.)

[3] Similar considerations dictate that construction and application of section 2283 is not to be influenced by any "assumption . . . that federal rights will not be adequately protected in the state courts," *Amalgamated Clothing Workers v. Richman Brothers,* 348 U.S. 511, 75 S. Ct. 452, 456, 99 L.Ed. 600 (1955), for

> "during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. . . . During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." *Id.* 75 S. Ct. at 456-57.

More specifically, the Court has clearly held that the only exceptions to section 2283 are those three expressly stated therein. Thus, in *Atlantic Coast Line,* the Court declared "[w]e cannot accept any . . . contention" that

"in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions," and proceeded to "hold that any injunction against state court proceedings . . . must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld." 90 S. Ct. at 1743. *See also Chick Kam Choo,* 108 S. Ct. at 1689 ("an injunction staying state proceedings is proper only if it falls within one of the statutory exceptions"); *Amalgamated Clothing Workers,* 75 S. Ct. at 454 ("the prohibition [of section 2283] is not to be whittled away by judicial improvisation"). Further, it is settled that these "exceptions are narrow and are 'not [to] be enlarged by loose statutory construction.' " *Chick Kam Choo,* 108 S. Ct. at 1689 (quoting *Atlantic Coast Line,* 90 S. Ct. at 1743).

[4] Moreover, it is likewise established that a claim of federal preemption—even one which is unmistakably clear—is not within any of the exceptions stated in section 2283 and hence does not suffice to authorize an injunction of state court proceedings. As stated in *Atlantic Coast Line*:

> "[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. . . . This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation." 90 S. Ct. at 1743.

See also Chick Kam Choo, 108 S. Ct. at 1691 (quoting the first sentence set out above and stating "when a state proceeding presents a fedreal issue, even a preemption

issue, the proper course is to seek resolution of that issue by the state court"); *T. Smith,* 275 F.2d at 404-05. This is true whether the preemption is that of federal maritime law, *Chick Kam Choo,* or the LHWCA, *T. Smith,* or the National Labor Relations Act, *Amalgamated Clothing Workers.*

[5] Nor is the result any different because the federal preemption is such as to deprive the state court of *jurisdiction.* In *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468, 75 S. Ct. 480, 99 L.Ed. 546 (1955), the Supreme Court had before it, on direct review, a state court injunction of union picketing, and stated that "[t]he principal question that the case raises" is "whether the state court had jurisdiction to enjoin" the union "or whether its jurisdiction had been preempted" by the National Labor Relations Act. *Id.* 75 S. Ct. at 484. The Court set aside the injunction, ruling that the state court lacked jurisdiction by virtue of the federal preemption. A week later, the Court decided *Amalgamated Clothing Workers,* which it described as involving a state court injunction of union conduct "under similar circumstances" to those of *Weber.* 75 S. Ct. at 453. However, in *Amalgamated Clothing Workers,* the union had procured a federal court injunction of the state court proceedings, and the issue was whether this was prohibited by section 2283. The Court noted that "[u]nder the decision in *Weber* . . . we may assume that the [union] conduct in controversy . . . is outside state authority." 75 S. Ct. at 454. It then proceeded to reject the argument that this sufficed to avoid the prohibition of section 2283:

> "[W]e cannot accept the argument . . . that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly

> without jurisdiction over the subject matter, having invaded a field pre-empted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now." *Id.* at 455 (footnote omitted).

Plainly, the Court held that a complete lack of state court subject matter jurisdiction, due to federal pre-emption, comes within none of the exceptions to section 2283 and provides no basis for avoiding the prohibition of section 2283. *Amalgamated Clothing Workers* has continued to be cited with approval for its holding in this respect. *See, e.g., Atlantic Coast Line,* 90 S. Ct. at 1747;[9] *Chick Kam Choo,* 108 S. Ct. at 1691. In *T. Smith,* we applied the above-quoted portion of *Amalgamated Clothing Workers* to conclude that section 2283 prevented a federal court from enjoining the state suit for state workers' compensation benefits of a longshoreman injured on a merchant vessel lying in navigable waters as against the argument, the validity of which we assumed, that the LHWCA and the rule of *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L.Ed. 1086 (1917), were completely preemptive of the state claims and that the case was one "involving exclusive federal jurisdiction." *See* 275 F.2d at 404-05.

[6] Finally any doubts are to be resolved in favor of allowing the state court action to proceed. As the Court stated in *Atlantic Coast Line*:

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9. We also observe that Justice Brennan, with whom Justice White joined, in his dissenting opinion in *Atlantic Coast Line, id.* 90 S. Ct. at 1748, stated: "Nor do I dispute the Court's holding on the basis of *Amalgamated Clothing Workers* . . . that federal courts do not have authority to enjoin state proceedings merely because it is asserted that the state court is improperly asserting jurisdiction in an area preempted by federal law. . . ."

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." 90 S. Ct. at 1748.[10]

Protect or effectuate its judgments

[7] The "except . . . to protect or effectuate its judgments" language of section 2283 has been referred to as the "relitigation exception." Its general function and purpose were described in *Chick Kam Choo* as follows:

> "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Id.*, 108 S. Ct. at 1690.[11]

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10. It is, of course, also "settled that the prohibition of § 2283 cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding." *Id.* at 1743.

11. The wording of section 2283, as well as the "by the federal court" language in the above quotation, may suggest that the judgment to be protected must be that of a federal court. Here all that is involved is the ALJ's September 1984 award, which had become final and unappealable, and which TEIA had fully paid, long before TEIA filed this suit.

However, like the panel, 820 F.2d at 1416 n. 10, we do not decide but merely assume, *arguendo* only, that the fact that what is here involved is an ALJ award, rather than a court judgment, does not of itself necessarily preclude resort to this exception.

We note that language in *International Association of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125 (5th Cir. 1975), may indicate that an NLRB ruling can be the basis for invoking the "relitigation exception" to section 1983. However, in *Nix*, *prior* to the federal injunction suit, the NLRB ruling had been appealed to and affirmed by this Court and also, in a separate federal district

Clearly, the ALJ award does not preclude Jackson's state suit claims under a collateral estoppel theory, and certainly not for purposes of the relitigation exception to section 2283. The ALJ award makes no determination whatever respecting the bad faith or good faith of TEIA in withholding payment to Jackson of LHWCA benefits, or of whether Jackson suffered emotional distress or the like as a result, or whether Jackson could recover damages on account thereof. Indeed, none of these matters are even alluded to in the ALJ award. Nor did Jackson ever seek any such determination or relief before the ALJ. It is plain that none of these matters were either litigated before or determined by the ALJ. Collateral estoppel, or "issue preclusion," requires, among other things, that the allegedly precluded issue have been "actually litigated and determined" in the prior action. *Restatement (Second) Judgments* § 26. *See also Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S. Ct. 865, 867, 99 L.Ed. 1122 (1955) ("collateral estoppel . . . precludes relitigation of issues actually litigated and determined in the prior suit"); *Montana v. United States*, 440 U.S. 147, 99 S. Ct. 970, 973, 59 L.Ed.2d 210 (1979); *International Association of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 132 (5th Cir. 1975); Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4419 at 177 ("[b]asic statements of the requirements for issue preclusion demand

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court suit brought by the party who was later the state court plaintiff, had been held to be preclusive of the claims subsequently raised in the state suit. Thus in *Nix*, invocation of the relitigation exception did not rest only on the NLRB ruling, or even on its judicial affirmance, but also on the prior federal district court suit judgment that the NLRB ruling precluded the claims which were raised in the subsequent state suit. *Id.*, 512 F.2d at 131.

that the issues have been both actually litigated and actually decided") (footnote omitted).

These requirements have been stringently enforced for purposes of the relitigation exception to section 2283. Thus, in *Atlantic Coast Line,* the prior federal action had denied the railroad an injunction against the union's picketing, which the railroad sought on account of alleged union violations of the Railway Labor Act and the Interstate Commerce Act, the federal district court having ruled that the Railway Labor Act granted the union the right to strike. Subsequently, the railroad procured a state court injunction against the union on the ground that its strike was illegal under state law. The union then returned to the federal court and enjoined the state proceeding, contending that the injunction was authorized by the relitigation exception to section 2283. The Supreme Court disagreed, because the prior federal action had not expressly determined that the Railway Labor Act precluded an injunction on state law grounds.[12] *Id.* In *Chick Kam Choo,* the Court reaffirmed this holding, observing that "[t]he proper scope of the [relitigation] exception is perhaps best illustrated by this Court's decision in *Atlantic Coast Line, supra.*" 108 S. Ct. at 1690. *Chick Kam Choo* goes on to state:

> "[A]s *Atlantic Coast Line* makes clear, an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court.

12. In fact, as the Supreme Court had earlier held, the Railway Labor Act *did* prevent such an injunction. *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109, 22 L.Ed.2d 344 (1969).

> Moreover, *Atlantic Coast Line* illustrates that this prerequisite is strict and narrow. The Court assessed the precise state of the record and what the earlier federal order *actually* said. . . ." *Id.*[13]

Given this standard—or, for that matter, any other reasonable standard—it cannot possibly be concluded that the ALJ actually decided adversely to Jackson any of the issues presented by his state suit.

[8] TEIA contends, however, that the ALJ's award bars Jackson's state suit under the doctrine of claim preclusion, or "true" *res judicata*. While the bar of *res judicata*, in this sense, does not depend on the issues or theories actually litigated or decided in the prior case, it does require, among other things, an identity of cause of action or claims. *See, e.g., Restatement (Second) Judgments* §§ 18(1), 25; *Montana*, 99 S. Ct. at 973, 974; *Lawlor*, 75 S. Ct. at 867; *Nix*, 512 F.2d at 131. As explained in Wright, Miller and Cooper, *supra*, a single cause of action or claim cannot be "split" by advancing one part in an initial suit and attempting to reserve another part for a later suit. *Id.*, § 4402 at 8. Moreover, in determining whether a prior court judgment bars a later suit, we have generally applied a broad definition of "claim" or "cause of action," following the *Restatement* formulation in this respect. *See Nilsen v. City of Moss Point*, 701 F.2d 556, 559-62 (5th Cir. 1983); *Restatement (Second) Judgments* §§ 24, 25. TEIA urges that Jackson's state suit claims for bad faith withholding of

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13. *See also Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960) ("[A] complainant must make a strong and unequivocal showing of relitigation of the same issue" to avoid the bar of section 2283, and "[i]f we err, all is not lost. A state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel.").

LHWCA compensation benefits and resulting emotional distress are a "part of the [same] transaction, or series of connected transactions, out of which" his claim before the ALJ for the LHWCA benefits themselves "arose," *id.*, § 24(1), and are hence the same claim or cause of action for purposes of claim preclusion. Accordingly, TEIA argues that this suffices to invoke the relitigation exception to section 2283. We disagree.

It may be doubted that TEIA's argument is consistent with the statement in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S. Ct. 1545, 1560, 16 L.Ed.2d 642 (1966), that *res judicata* applies where the administrative agency "resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." Here, as noted, the ALJ resolved no disputed issues adversely to Jackson, and the issues of TEIA's bad or good faith and Jackson's emotional distress were simply not before or resolved by the ALJ, there was no opportunity to litigate them, and they were not litigated. Moreover, TEIA's argument likewise appears to be inconsistent with *Chick Kam Choo's* admonishment that the relitigation exception "is strict and narrow" so that only "claims or issues which . . . actually have been decided" in the prior proceeding as reflected by what the prior "order *actually* said" are protectable thereunder. 108 S. Ct. at 1690.

TEIA and Jackson have both consistently, and correctly, taken the position that TEIA's good faith or lack thereof in filing its controversions in the LHWCA proceedings, and its good faith or lack thereof in suspending payment of LHWCA compensation benefits pursuant thereto, were matters that were legally irrelevant to any relief Jackson was entitled to under the LHWCA or in

the proceedings before the ALJ, as was also any emotional distress Jackson suffered as a result of such suspensions, and that the ALJ had no jurisdiction to pass on, or award Jackson anything by reason of, the matters asserted in his state suit.[14] Moreover, Jackson could recover LHWCA benefits only by going through administrative proceedings as provided in the LHWCA, including the proceedings before the ALJ in which he was awarded all the relief available under the LHWCA. Thus, this case fits into a well-recognized exception to claim preclusion, as provided in *Restatement (Second) Judgments* § 26(1)(c), for instances where the relief sought or theory advanced in the first suit is cognizable only before a court of limited jurisdiction not competent to act on the theory advanced or relief sought in the second suit. This principle has particular applicability when claim preclusion is sought to be established on the basis of a prior administrative proceeding. As the *Restatement (Second) Judgments* explains:

> "The qualifications and exceptions to the rule of claim preclusion have particular importance with respect to adjudications by administrative agencies. One important qualification has to do with the definition of 'claim' itself. In the context of civil actions in courts, the term 'claim' is broadly defined. . . . This broad definition reflects the fact that in modern practice judicial tribunals usually have comprehensive authority to adjudicate all contentions of fact

14. This is not to say that the LHWCA does not preempt Jackson's state law claims. The point is that such a bar to those claims would arise from the LHWCA itself, regardless of whether there was any ALJ decision, and not from the ALJ award. That is the difference between preemption, which affords no basis for avoiding the bar of section 2283, and relitigation, which does (assuming, *arguendo,* its applicability to federal administrative determinations).

and all legal theories that may arise from a transaction. Since a judicial tribunal has such comprehensive authority, a litigant may justly be required to avail himself of that authority and to assert in a single action all factual and legal contentions that might be made. . . .

"In contrast, the jurisdiction of administrative agencies is usually defined in terms of specified substantive legal provisions, for example, workers' compensation. . . . Since the tribunal's authority is delimited in substantive legal terms, the tribunal ordinarily lacks authority to adjudicate claims arising out of the transaction in question but based upon other substantive legal premises. Thus, a workers' compensation commission usually lacks authority to consider claims for punitive damages for injuries intentionally inflicted on an employee in the course of employment. . . . These limitations on authority of the tribunal should carry corresponding limitations on the scope of 'claim' for purposes of the rule of claim preclusion.

"Furthermore, the exceptions stated in § 26(1)(c) and (d) are particularly important in considering claim preclusion with respect to an administrative agency determination. Section 26(1)(c) provides that preclusion is inapplicable to that part of a claim that is a possible basis for a second action where 'the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the competency of the [tribunal]. . . .'" *Id.* § 83, comment *g*.

Federal courts have routinely applied these principles. *See, e.g., United States v. Radio Corporation of America,* 358 U.S. 334, 79 S. Ct. 457, 468, 3 L.Ed.2d (1959); *Parker v. Pavkovic,* 753 F.2d 1397, 1404 (7th Cir.),

cert. denied, 473 U.S. 906, 105 S. Ct. 3529, 87 L.Ed.2d 653 (1985); *Newport News Shipbuilding & Dry Dock Co. v. Director,* 583 F.2d 1273, 1278 (4th Cir. 1978), *cert. denied,* 440 U.S. 915, 99 S. Ct. 1232, 59 L.Ed.2d 465 (1979) (denial of workers' compensation benefits by Industrial Commission of Virginia not claim preclusive of entitlement to LHWCA benefits). *See also* Wright, Miller & Cooper, *supra,* §§ 4412, 4475.[15] We applied this doctrine in the section 2283 context in *Nix,* where we rejected the argument that an NLRB determination that an employee's firing was not an unfair labor practice and hence did not mandate reinstatement was claim preclusive of the employee's state court claim seeking reinstatement on the basis that the firing constituted a breach of contract, stating:

> "The fallacy of this argument is that the doctrine of res judicata is applicable only when the cause of action in the second suit is identical to the cause of action in the first. . . . He [the employee] could only

15. Wright, Miller & Cooper state essentially the same rules:
"It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding, and even clearer that no penalty should be inflicted if a deliberate effort to combine such matters has been expressly rejected." *Id.* § 4412 at 93.
"Matters that can be advanced only before an administrative agency ordinarily do not form part of a single claim with matters that can be advanced only before another agency or a court." *Id.* at 94 (footnote omitted).
"Limits on the competence of a particular agency, moreover, may lead to the conclusion that it lacked authority or occasion even to address the legal issues tendered in a subsequent judicial action. If an agency nonetheless presumes to decide an issue beyond its jurisdiction, courts are likely to apply vigorously the general principle that preclusion is defeated when strong policies underlie the lines that limit the authority of the tribunal that made a prior decision." *Id.* § 4475 at 767-68 (footnotes omitted).

> have brought the unfair labor practice charges before the NLRB. Since he was unable to bring the contract claim based on state law in that forum, he did not 'split his cause of action' by bringing it in state court." 512 F.2d at 131.

Accordingly, it is clear that the ALJ's award was neither claim preclusive nor issue preclusive of Jackson's state court suit, and that it could not suffice to invoke the relitigation exception to section 2283. There being no other even arguable basis for that exception, we hold it was unavailable.

"[A]s expressly authorized by Act of Congress"

We turn now to the "as expressly authorized by Act of Congress" exception to section 2283, the only other exception stated in section 2283 and relied on either by TEIA or the district court (*see* note 6 *supra*). The only "Act of Congress" asserted to "expressly authorize[ ]" the injunction in question is section 21(d) of the LHWCA, 33 U.S.C. § 921(d), which provides as follows:

> "If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to

> enjoin upon such person and his officers and agents compliance with the order."

[9, 10] In this connection, TEIA relies on *Mitchum v. Foster,* 407 U.S. 225, 92 S. Ct. 2151, 32 L.Ed.2d 705 (1972), which held that 42 U.S.C. § 1983 was within this exception to section 2283 despite the fact that section 1983 neither expressly refers to section 2283 nor expressly authorizes injunctions of state court proceedings. *Id.* at 2159. However, *Mitchum* placed heavy reliance on the fact that it was "clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action . . . whether that action was executive, legislative or *judicial.' Ex parte Virginia,* 100 U.S. 339, 346, 25 L.Ed. 676 (emphasis supplied)." There is simply no comparable legislative history respecting the LHWCA. Moreover, *Mitchum* plainly requires, in order for the expressly authorized exception to be invoked, that

> "an Act of Congress must have created a *specific* and uniquely federal *right* or remedy, *enforceable in a federal court of equity, that could be frustrated* if the federal court were not empowered to enjoin a state court proceeding." *Id.* 92 S. Ct. at 2159 (emphasis added).

This passage unambiguously requires that what must be subject to frustration, absent exception to section 2283, is a specific, uniquely federal right enforceable in a federal court of equity. The only such federal right enforceable in a federal court of equity that section 921(d) creates is a right on behalf of the covered employee (or administrative official on his behalf) to enforce against an em-

ployer or insurer payment of an award made under the LHWCA. Obviously, that right could not possibly be frustrated if the federal court were unable to enjoin state proceedings brought by the worker against the insurance carrier for tort damages allegedly due the worker under state law. Simply stated, section 921(d) does not confer rights—let alone a specific and uniquely federal right enforceable in a federal court of equity—on the LHWCA employer or its insurance carrier.

[11] Of course, the fact that the statute authorizes an injunction by one party for one purpose, and hence in in such a case may come within the expressly authorized exception to section 2283, does not mean that the bar of section 2283 is inapplicable where an injunction is sought by a different party and for a different purpose. That, indeed, is the clear holding in *Amalgamated Clothing Workers,* where the Court refused to find that the "expressly authorized" exception applied to an injunction sought by a union against state court injunctive proceedings brought against it by the employer, despite the fact that the relevant statute did authorize analogous federal injunctive relief at the request of the National Labor Relations Board. 75 S. Ct. at 455-56.[16] Moreover, a contrary conclusion would clearly be inconsistent with the result in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S. Ct. 2881, 53 L.Ed.2d 1009 (1977). To say that the LHWCA provision entitling workers to secure injunctions against employers or insurers for one purpose authorizes the latter to procure injunctions against the

16. *Amalgamated Clothing Workers* specifically distinguished the earlier decision in *Capital Service, Inc. v. National Labor Relations Board,* 347 U.S. 501, 74 S. Ct. 699, 98 L.Ed. 887 (1954), on that basis. 75 S. Ct. at 456.

former for a wholly different purpose is simply to stand the LHWCA on its head. It also wholly disregards the words "as expressly" in section 2283 and the admonitions of the Supreme Court that section 2283's prohibition "is not to be whittled away by judicial improvisation," *Amalgamated Clothing Workers,* 75 S. Ct. at 454, and that its exceptions "are narrow and 'are not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo,* 108 S. Ct. at 1689.

The district court also made passing reference in this connection to section 5(a) of the LHWCA, 33 U.S.C. § 905(a), the exclusivity of the statute.[17] However, nothing in section 5(a) purports to grant anyone a right or remedy "enforceable in a federal court of equity." Section 5(a) may indeed provide a basis for TEIA's claims that Jackson's state law claims are preempted by the LHWCA, but, as we have observed, that does not suffice to avoid the bar of section 2283. *See, e.g., Chick Kam Choo,* 108 S. Ct. at 1691.

Accordingly, we hold that the "as expressly authorized by Act of Congress" exception to section 2283 is inapplicable.

Injunctive relief not available

[12] Section 2283 generally bars injunctions against the prosecution of pending state court proceedings. The only exceptions are those stated in section 2283 itself, and none of those are applicable here. That being the

17. Section 905(a) provides in pertinent part:
"The liability of an employer prescribed in section 904 of this title [liability for compensation benefits and medical expenses] shall be exclusive and in place of all other liability of such employer to the employee . . . on account of such injury. . . ."

case, federal preemption or interference with a federally protected right, even when such is unmistakably clear, does not suffice to avoid the bar of section 2283. Section 2283 hence deprived the district court of authority to issue the injunction.

Declaratory Judgment

We next turn to the remaining question presented, namely, whether the district court, though barred by section 2283 from granting TEIA an injunction against Jackson's further prosecution of his state suit, could nevertheless grant TEIA's request for declaratory judgment that Jackson's state suit claims were all invalid because preempted by the LHWCA or precluded by the ALJ award.

[13] One of the main purposes of the Federal Declaratory Judgment Act (note 2, *supra*) was to provide a means to grant litigants judicial relief from legal uncertainty in situations that had not developed sufficiently to authorize traditional coercive relief. Litigants would no longer be put to the Hobson's choice of foregoing their rights or acting at there peril; nor, if they had already acted, would they be forced to wait, for perhaps many years, until the statute of limitations expired, to know whether they had been subjected to some significant liability. *See, e.g., Perez v. Ledesma,* 401 U.S. 82, 91 S. Ct. 674, 690-92, 27 L.Ed.2d 701 (1971) (opinion of Justice Brennan, joined by Justices White and Marshall, concurring in part and dissenting in part). In the words of Professor Borchard, in his written statement submitted at the hearings on the Federal Declaratory Judgment Act, with the enactment of that statute the courts would no longer have to tell "the prospective victim that the only

way to determine whether the suspect is a mushroom or a toadstool, is to eat it."[18]

TEIA's instant suit is wholly outside the foregoing parameters. As previously noted, it was filed almost a year after Jackson's state suit was filed, and many months after the ALJ's award had become final and had been paid in full. The state court had overruled TEIA's plea in bar, and the state case was moving along to trial. TEIA's conduct complained of in the state suit had long since been concluded, and years had passed since Jackson had engaged in any LHWCA-covered employment. There was no putative mushroom that TEIA wished to eat, but only after first receiving judicial advice. Nor was TEIA in the position of not knowing when its potential liability would ever be judicially determined, for the state case was moving to resolution. There was no dispute between TEIA and Jackson other than Jackson's state

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18. Hearings on H.R. 5623 before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess., 75-78 (1928), as quoted in *Perez*, 91 S. Ct. at 692. In *Perez*, Justice Brennan also quotes from the Senate Report (S. Rep. No. 1005, 73d Cong., 2d Sess. (1934)) on the Federal Declaratory Judgment Act the following, among other passages:

> " 'The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity.' " *Perez*, 91 S. Ct. at 690-91.

By contrast, it has long been recognized that " '[t]he wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing . . . to choose a forum.' " *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166, 168 (5th Cir. 1986) (quoting *H.J. Heinz Co. v. Owens*, 189 F.2d 505, 508 (9th Cir. 1951), *cert. denied*, 342 U.S. 905, 72 S. Ct. 294, 96 L.Ed. 677 (1952), quoting *American Automobile Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939)).

suit. TEIA's federal action was not to resolve a controversy that existed independently of Jackson's state suit; nor was it to decide some other controversy, with merely incidental effect on the state suit. It is plain that the *only* purpose and effect of TEIA's federal suit was to defeat Jackson's state suit against it and to, in effect, overrule the state trial court's denial of TEIA's plea in bar.

To allow declaratory relief in these circumstances would be to transform section 2283 from a pillar of federalism reflecting the fundamental constitutional independence of the states and their courts, to an anachronistic minor technicality, easily avoided by mere nomenclature or procedural slight of hand. A federal declaratory judgment will, of course, be *res judicata* of the state suit, thus resolving it as surely as an injunction, and in any event the declaratory judgment can itself be enforced by injunction under 28 U.S.C. § 2202 pursuant to the "protect or effectuate" exception to section 2283. As the Court observed in *Samuels v. Mackell,* 401 U.S. 66, 91 S. Ct. 764, 767-68, 27 L.Ed.2d 688 (1971):

> "[Ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting '[f]urther necessary or proper relief,' 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declara-

> tory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would."

[14] Accordingly, we follow the weight of authority in holding that "[i]f an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." Wright, *Federal Courts* § 47 at 285 (4th Ed. 1983).[19] *See also, e.g., Ahrensfeld v. Stephens,* 528 F.2d 193, 197 n. 6 (7th Cir. 1975) ("Nearly all of the cases in this area involve declaratory as well as injunctive relief. Declaratory relief has been generally regarded as to be as objectionable in this context as injunctive relief."); *Thiokol Chemical Corp. v. Burlington Industries, Inc.,* 448 F.2d 1328, 1332 (3d Cir. 1971), *cert. denied,* 404 U.S. 1019, 92 S. Ct. 684, 30 L.Ed.2d 668 (1972);[20] *Chandler v. O'Bryan,* 445 F.2d 1045, 1058 (10th Cir. 1971), *cert. denied,* 405 U.S. 964, 92 S. Ct. 1176, 31 L.Ed.2d 241 (1972) ("[W]here an injunction is improper under § 2283, declaratory relief should not be given. *Samuels v. Mackell* . . ."); *Garrett v. Hoffman,* 441 F.

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19. To the same effect is Wright, Miller & Cooper, *supra,* § 4222 at 503-04 ("Thus if a declaratory judgment would have essentially the same effect as an injunction, it should be refused if the injunction would be barred by § 2283." (Footnote omitted.)).

20. *Thiokol* states (448 F.2d at 1332): "Normally, the policy that precludes federal injunctions against state actions is also applied to prohibit declaratory judgments. . . . True, the statute [section 2283] explicitly prohibits only injunctions. Its analogical extension to prohibit declaratory judgments is justified in situations where the underlying policy against unseemly interference with proper state litigation applies to both," and accordingly, the federal declaratory judgment suit "should not proceed unless and until it shall appear to and be found by the district court that the state court is willing to hold the matter before it in abeyance pending a declaratory federal adjudication."

Supp. 1151, 1155-56 (E.D. Pa. 1977). In *H.J. Heinz Co. v. Owens,* 189 F.2d 505 (9th Cir. 1951), *cert. denied,* 342 U.S. 905, 72 S. Ct. 294, 96 L.Ed. 677 (1952), the Ninth Circuit affirmed the dismissal of a federal suit for injunctive and declaratory relief aimed at a pending state proceeding. The Court noted that section 2283 barred injunctive relief and, respecting declaratory relief, remarked on "the perversion of the purpose of declaratory judgment legislation which occurs when it is used to anticipate the result of litigation pending in another forum," *id.* 189 F.2d at 508, and went on to state:

> "The strong and consistently recognized national policy to avoid such needless conflict or friction between state and federal courts underlies and finds legislative expression in Section 2283. . . . [T]his statute and the policy underlying it afford sound basis for a judicial conclusion that the granting of such declaratory relief would constitute an abuse of discretion." *Id.* at 509.

Heinz was cited with approval in this respect in *Samuels v. Mackell,* 91 S. Ct. at 768. Likewise, in *T. Smith,* we quoted with approval the concluding portion of the above-set out language, beginning with "this statute." 275 F.2d at 406.

Finally, any remaining doubt on this score was surely laid to rest by the decision in *California v. Grace Brethren Church,* 457 U.S. 393, 102 S. Ct. 2498, 73 L.Ed.2d 93 (1982), where the Court held that the Tax Injunction Act, 28 U.S.C. § 1341,[21] precluded declara-

21. Section 1341 provides:
"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

tory judgment that a state tax law was unconstitutional. The Court observed:

> "Although this Court once reserved the question, we now conclude that the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *Grace Brethren Church,* 102 S. Ct. at 2507 (footnote omitted).

The *Grace Brethren Church* opinion goes on to explain:

> "[B]ecause there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another. . . ." *Id.* at 2508.

The same reasoning is fully applicable to section 2283.

For its holding that section 2283 though barring an injunction nevertheless did not prohibit declaratory relief, the panel majority, 820 F.2d at 1420, relied primarily on *Steffel v. Thompson,* 415 U.S. 452, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974), particularly its language that injunctions were "strong medicine" while declaratory relief was "less intrusive." *Id.* at 1219, 1221. We disagree, and on the contrary read *Steffel* as wholly consistent with the view that declaratory relief is inappropriate where section 2283 bars an injunction. The crucial fact in *Steffel* was that there was no pending state court proceeding. Section 2283, however, "has no application until the [state] proceedings have begun. An injunction can issue from a federal court restraining a party from instituting state proceedings." Wright, Miller & Cooper, *supra,* § 4222 at 506-07. Thus *Steffel* did not present a situation

where declaratory relief could be used to achieve a result forbidden by section 2283. In *Steffel,* the party seeking declaratory relief desired to engage in handbilling at a shopping center, but had been warned that if he did so he would be arrested and charged with violating a state criminal statute. He then, without ever having been arrested or charged, sought in the federal court a declaratory judgment that the state statute was unconstitutional. 94 S. Ct. at 1214.[22] That no state proceeding was pending was not merely incidental to *Steffel,* but was rather critical to both its reasoning and result.

Steffel commences by stating that "[t]his case presents the important question . . . whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending." *Id.* at 1213. It observes that "the Court's recognition that the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.' " *Id.* at 1217. In a significant passage, it then sets out four reasons why declaratory relief in these circumstances is not inappropriate:

> "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention [1] does not result in duplicative legal pro-

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22. It is to be noted that *Steffel* presented the classic case for declaratory relief, where the plaintiff is put to the Hobson's choice of giving up an intended course of conduct which he believes he is entitled to undertake or facing possible severe civil or criminal consequences if he does undertake it. *Steffel* in this connection reiterates Professor Borchard's comments, in urging enactment of the Federal Declaratory Act, about the mushroom-toadstool dilemma, *id.* at 1220 n. 18, and otherwise reviews the legislative history of that statute to show it was intended to afford relief in such circumstances. *Id.* at 1219-22. Those considerations are wholly inapplicable to the present case, and likewise to most or all others covered by section 2283, which presupposes a pending state proceeding.

> ceedings or [2] disruption of the state criminal justice system; [3] nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, [4] while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity. . . ." *Id.* at 1217 (bracketed numbers supplied).

It is to be noted that *none* of these considerations favoring declaratory relief is applicable here, nor would any of them be applicable in almost any case in which section 2283 prevented injunctive relief as each depends on the absence of a pending state suit.

Thus, Steffel's mention of the "less intrusive" nature of declaratory relief must be understood as referring to instances where there is no pending state proceeding. This is made plain by the following passage from the opinion:

> "*When* no state proceeding is pending *and thus* considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief." *Id.* at 1217 (emphasis added).

Moreover, *Steffel's* heavy reliance, *id.* at 1219-22, on Justice Brennan's separate opinion in *Perez* is highly

relevant. In his *Perez* opinion, Justice Brennan clearly stated:

> "[W]here a state proceeding exists that was pending at the time suit was filed in federal court the federal court should ordinarily decline to render either declaratory or injunctive relief." 91 S. Ct. at 693 (footnote omitted).[23]

Surely Justice Brennan, in his *Steffel* opinion, had no intention of departing from what he had written in *Perez*. At all events, the Court's most recent opinion on this subject in *Grace Brethren Church* clearly points to the result we reach here.

We conclude that section 2283 and the policies which underlie it prohibit declaratory as well as injunctive relief here. This prevents the emasculation of section 2283 and accomodates the concerns of comity and federalism which underlie it, while at the same time preserving the core functions and purposes of the Declaratory Judgment Act.

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23. Other portions of Justice Brennan's *Perez* opinion are in accord, *viz*:

> "[T]he most significant factor determining the propriety of federal intervention is whether a state proceeding exists that was initiated *before* the federal suit was filed.
>
> ". . . .
>
> ". . . The pending state proceeding ordinarily provides an existent, concrete opportunity to secure vindication of constitutional claims in the state courts, with ultimate review by this Court. In this situation collateral resort to a federal court will not speed up the resolution of the controversy. . . . Moreover, federal intervention may disrupt the state proceeding. . . . Federal adjudication of the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the State's own adjudicative process. For these reasons, federal courts should not ordinarily intervene by way of either declaratory or injunctive relief. . . ." *Id.* at 692, 695 (emphasis in original).

Accordingly, the district court should not have entertained TEIA's request for declaratory judgment.[24]

Conclusion

We do not pass on the merits of TEIA's preemption claim. Assuming, as we do, that the claim has merit, we nevertheless hold that pursuant to section 2283 and the principles underlying it the district court should not have entertained TEIA's request for either injunctive or declaratory relief. As that is all the relief sought by TEIA, its suit must be dismissed. The dismissal is, of course, without prejudice to TEIA's assertion that the claims advanced against it by Jackson in his state suit are preempted by the LHWCA. That matter we leave to resolution, as between Jackson and TEIA, by the state trial court, subject to review by the state appellate courts and ultimately by the United States Supreme Court.

Accordingly, the judgment of the district court is REVERSED and the cause is ordered DISMISSED.

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24. The dissent asserts that declaratory (though not injunctive) relief was proper because the state suit was removable since the LHWCA completely displaced and preempted all Jackson's claims therein under the theory of *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987). As stated in note 8, *supra,* we do not resolve whether or not the attempted analogy to *Metropolitan Life* is apt. Of course, if the state court suit were never potentially removable, the removal argument is necessarily unavailing to sustain declaratory relief. Assuming, *arguendo* only, that Jackson's state court suit was potentially removable, there has never been even any attempt to remove it, and the right of removal is clearly one which may be waived. We decline to authorize an "end run" around removal procedures and jurisprudence by authorizing a party to ignore removal (and its limitations) but nevertheless achieve the same result by filing a federal court declaratory judgment suit with the sole object of litigating a preemptive defense to the federal defendant's earlier filed, pending state court suit against the federal plaintiff.

CLARK, Chief Judge, concurring specially in the opinions of Circuit Judges GARWOOD and ALVIN B. RUBIN:

In this case that has produced three other opinions, I add a fourth, not to say I disagree with any of them but to emphasize the one critical matter that none of us disputes: *The state cause of action is preempted by LHWCA*. If I could read *Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987), to permit declaratory relief, I would join Judge Brown. His reasoning would assure the only just, common-sense end to this law suit. While the majority opinion is full of proper legal sound and fury, it can signify nothing but trouble or injustice.

I wish I didn't feel bound to agree that precedent compels this court to send the case to a court that, if it acts correctly, may only dismiss. If the State court should act improperly to entertain this litigation and grant the relief sought by plaintiff, the only hope (and that hope is a forlorn one as Judge Rubin points out) for correction the Association will have will be the chance it can secure discretionary review in an overburdened Supreme Court. I am at a loss to comprehend how this procedure can advance comity. Exalting the form of the anti-injunction act over the substance of preemption strips both comity and justice of their meaning.

ALVIN B. RUBIN, Circuit Judge, with whom JOHNSON, Circuit Judge, joins concurring (Circuit Judges BROWN and WILLIAMS join in part II):

I.

The court's opinion follows settled doctrine and I therefore join in it.

II.

It is time, however, for Congress to reconsider the statute that we are obliged to follow, for it is no longer adequate to assure the protection of federal rights.

There can be little doubt that the LHWCA preempts state jurisdiction over suits involving failure to pay compensation under the Act.[1] Yet we rely on state courts to enforce the employer's federal right not to have this claim litigated in state court, stating that, if state courts do not protect that right, the employer may seek relief from the United States Supreme Court. While the state courts once had exclusive original jurisdiction over claims arising under federal law, federal-question jurisdiction is now vested in the federal district courts with appeal to the circuit courts of appeal. State trial and appellate courts are therefore no longer as familiar with these questions as they were a century ago. The state court judgments in such cases are subject to final review by the Supreme Court, but this remedy is no longer available by appeal, for as a result of recent legislation virtually eliminating the Court's mandatory appellate juris-

1. See Majority Opinion, Footnote 7.

diction,[2] litigants must seek relief by application to the Court for a writ. Such writs are only sparingly granted. In the 1987-88 term, which was typical, the Court granted only 267 writs, including the miscellaneous docket, and published only 259 opinions, including per curiams and memoranda. Given the other demands on the Court's time, including the presentation to it each year of more than 4400 applications for writs, the number of cases in which state courts decide federal-preemption questions, and the even larger number in which federal courts abstain from deciding federal issues, again leaving final, now discretionary, review to the Supreme Court,[3] the volume of litigation presented to the Court is now so large that the Court simply cannot adequately assure the protection of federal rights in those cases. Thus both in cases governed by the Anti-Injunction Act and in those controlled by rules requiring federal court abstention, the promised ultimate review by the Supreme Court is apt to be illusory. The remedy, of course, lies with Congress, or, in abstention cases, in reconsideration of the doctrinal rules by the Supreme Court.

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2. Act of June 27, 1988, Pub. L. 100-352, §§ 3, 7, 102 Stat. 662, 664 (to be codified at 28 U.S.C. § 1257); *see* H.R. Rep. 660, 100th Cong., 2d sess. (1938), *reprinted in* 1988 U.S. Code Cong. & Admin. News 766-83.

3. *See, e.g., New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 850 F.2d 1069 (5th Cir. 1988).

JOHN R. BROWN, Circuit Judge, with whom JERRE S. WILLIAMS, Circuit Judge, joins dissenting in part and concurring in part:

I.

I concur in that portion of the Court's[1] opinion which in effect holds that LHWCA preempts Jackson's assorted Texas-based claims for tortious, bad faith, delay in payment and failure to pay and provide longshore benefits. Although it mildly disclaims[2] any such purpose, the disclaimer, under the accepted principles of the Fifth Circuit is ineffectual.

This Court, through Judge Garwood speaking for the panel (Judges Gee and Jones) in all of its majesty has indeed—as TEIA has long asserted—determined that any such state based claim is preempted by the LHWCA. *Atkinson v. Gates, McDonald & Company,* 838 F.2d 808, *reh'g en banc denied,* 844 F.2d 788 (5th Cir. 1988). The only remaining question is whether this decision effectually reflects the view of this Court en banc.

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1. As it is the court, and not just a majority, I use this terminology throughout to refer to Judge Garwood's powerful opinion for the Court sitting en banc.

2. *See* the Court's n. 7: "[A]nother panel of this Court . . . held that a state law cause of action for a bad faith failure to pay LHWCA compensation when due was preempted by the LHWCA. *Atkinson v. Gates, McDonald & Co.,* 838 F.2d 808, *rehg. en banc denied,* 844 F.2d 788 (5th Cir. 1988). Our holding concerning the Anti-Injunction Act and the Declaratory Judgment Act implies no disagreement with *Atkinson,* which remains the law of this Circuit unless overruled by a subsequent contrary pronouncement of the Supreme Court or of this Court en banc." *Texas Employer's Ins. Ass'n v. Jackson,* 820 F.2d 1406, 1412 n. 7 (en banc).

Under the long accepted and oft repeated[3] standards, *Atkinson* is binding on all panels of this court—which means all of the Judges thereof—until overruled by the court en banc. The en banc court does have the power to reject it, but until rejected by the court en banc it is the law of this circuit.

Here the court, citing *Atkinson* with full approval and no criticism or disapproval, has failed to reject or disapprove its holding. The decision is therefore binding on the Court of Appeals for the Fifth Circuit and each and all of the Judges comprising either the en banc court, the majority of the en banc court, or the panel.

Moreover on the intrinsic merits of preemption, *Atkinson* applies the same triple analysis used in the panel opinion[4] of (i) Congressional intention to preempt,[5] (ii) comprehensiveness of the federal scheme[6] and (iii) the state law conflicts with federal law[7] to declare the state case to be preempted.

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3. *Alexander v. Chevron, U.S.A.*, 806 F.2d 526, 527 (5th Cir. 1986) (citing *United States v. Albert*, 675 F.2d 712, 713 (5th Cir. 1982)); *Keith v. St. George Packing Co.*, 806 F.2d 525, 526 (5th Cir. 1986); *Ketchum v. Gulf Oil Corp.*, 798 F.2d 159, 162 (5th Cir. 1986); *Victorian v. Miller*, 796 F.2d 94, 96 (5th Cir. 1986); *Wilson v. Taylor*, 658 F.2d 1021, 1034 (5th Cir. 1981); *Washington v. Watkins*, 655 F.2d 1346, 1354 n. 10 (5th Cir. 1981); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192-93 (5th Cir. 1981) (citing *Ford v. United States*, 618 F.2d 357, 361 (5th Cir. 1980); *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976) and *Robinson v. Parsons*, 560 F.2d 720, 721 n. 2 (5th Cir. 1977)); *Fulford v. Klein*, 529 F.2d 377, 379 (5th Cir. 1976).

4. This refers to the panel (Judges Brown, Reavley and Jones) opinion, *Texas Employer's Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir. 1987). Judge Jones dissented in part in the panel opinion.

5. Panel Op., 820 F.2d 1406 at 1411.

6. *Id.* at 1411-12.

7. *Id.* at 1412.

II.

Without a doubt preemption of LHWCA is and always has been the critical issue in this case. It is the burning question now committed by the court to the state courts of Texas. In a day and time where the demands are beyond the capacity of the judiciary readily to handle the exponential increase in the volume of litigation, there is a need for an authoritative pronouncement of federal law by a federal court having jurisdiction over the subject and the parties.

That need, that demand is in no sense a theoretical, academic problem. Indeed a pronouncement of that federal constitutional law has immediate, great practical utility. Although this pronouncement has no coercive effect of its own, there is no doubt that the Texas courts will, as always, accord full weight to the determination of this federal court having jurisdiction over the parties, speaking in terms of the application of a federal statute with the constitutional imprimatur of the Supremacy Clause.

III.

I dissent as to the court's holding that, as in the case of an injunction, the Anti-Injunction Act prohibits in this case the issuance of a declaratory order.

I start with the proposition that despite the well-pleaded complaint rule sired by *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908), the case of *Jackson v. Texas Employers' Ins. Ass'n* filed in the District Court of Jefferson County, Texas, was one within the jurisdiction of the United States District Court. To be sure, the negative characteri-

zation of the well-pleaded complaint rule provides that the presence of a contention of federal preemption as a defense to the state-based claim, does not make the case within the jurisdiction of the federal court. But this negative characterization is dispelled by a proper consideration of Supreme Court precedents. In *Avco Corp. v. Machinists,* 376 F.2d 337 (6th Cir. 1967), *aff'd,* 390 U.S. 557, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968),[8] the plaintiff employee filed suit in state court alleging that the defendant union had breached its "contract" by sanctioning work stoppages. The employee sought temporary and permanent injunctions. Clearly, the plaintiff had a federal cause of action under § 301 of the LMRA, if he desired it. The union then sought to remove the case to federal court, over the employee's objections.

The court of appeals held, and the Supreme Court affirmed, that the employee's action "arose under" § 301, and thus the union's motion to remove the case to federal court was proper. (The removal statute,[9] is procedural and derivative only. An independent basis of jurisdiction must be established in either removal or declaratory judgment actions.) The necessary ground of decision in *Avco* was that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violations of contracts between an employer and a labor organization. . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. . . . *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action,

8. The majority, save for reference to Judge Jones' dissent in the panel opinion, avoids resolving "this difficult issue."

9. *See* 28 U.S.C. § 1441(b).

any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board,* 463 U.S. at 23-24, 103 S. Ct. at 2853, 77 L.Ed.2d at 440.

This continues to be controlling law. In a very recent decision, the Supreme Court has continued the trend begun nearly 20 years ago in *Avco.* In *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987),[10] the Court affirmed the vitality of *Avco* and extended the Avco-LMRA exception to analogous ERISA cases. After setting out the general nature of the well-pleaded complaint rule, the Court states

> One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-exempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character. For 20 years [since *Avco*], this Court has singled out claims preempted by § 301 of the Labor Relations Management Act for such special treatment.
>
> . . . .
>
> The question thus resolves itself into whether or not the *Avco* principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by § 502(a)(1)(B) [the section conferring private causes of action under ERISA] as an action arising under federal law.

481 U.S. ____, 107 S. Ct. at 1546-47, 95 L.Ed.2d at 63.

To answer that question, the Court, with little difficulty, found that Congress has conferred federal jurisdiction in

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10. The majority, save for reference to Judge Jones' dissent in the panel opinion, avoids resolving "this difficult issue."

cases with such overarching federal, legislatively declared interests. Accordingly, the Court concluded that *Taylor*, although "purport[ing] to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress." *Id.* at ____, 107 S. Ct. at 1548, 95 L.Ed.2d at 65.[11]

Our question, then, is whether the LHWCA is powerful enough to satisfy the principle of *Avco* and *Taylor*: stated differently, is the LHWCA entitled to the same federal protection as are the LMRA and ERISA. It is a question easily answered in the affirmative. The Court focuses on the "explicit direction" from Congress—both in statute and legislative history—that demonstrates its intent utterly to "displace" state law in establishing federal question jurisdiction. As set forth in some detail in the panel opinion, the LHWCA, springing originally from the impeccably federal province of admiralty jurisdiction, has continued, unquestioned through fifty years of Congressional monitoring, to remain squarely under the protection of federal jurisdiction. A review of the LHWCA and its legislative history yields at least as strong "explicit direction."

Our determination that the LHWCA is so preemptive as to create federal question jurisdiction is no "expansion"

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11. Only a few illustrations are necessary to reveal how pervasive is the LHWCA and how destructive an interference are Jackson's state asserted claims. For example, in Paragraph VII of Jackson's state court complaint, Jackson purports to invoke Article 21.21 of the Texas Insurance Code in pleading that "three times the amount of actual damages be awarded as a matter of law." Yet § 905 of the LHWCA provides that the liability prescribed under the Act "shall be exclusive and in place of all other liability. . . .

Jackson also abrogates the Congressionally established scheme of LHWCA economic rights and limitations in Paragraph XIV of his complaint. There, he invokes the Texas Deceptive Trade Practices Act seeking "as a matter of law [that] damages be trebled."

of the *Avco* rule. The LHWCA, if anything, is broader, and more comprehensive than the LMRA. The LMRA merely places jurisdiction of labor disputes in the federal district courts. The LHWCA, on the other hand, contains not only the exclusive remedy section (§ 905(a)), but also sets out sections and chapters that comprehensively regulate employers and insurance carriers that provide LHWCA coverage, and utterly control the sum total of rights and obligations of insurers, employers and employees. This, by no means, then, dilutes the *Avco* rule; it acknowledges an exception more powerful than the original. *See also Taylor,* 481 U.S. ____, ____, 107 S. Ct. at 1548, 95 L.Ed.2d at 65 (Brennan, J., concurring).

There is no doubt that Jackson's state suit was bottomed on the LHWCA.[12] Without it, no payments were

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12. *See* the Court's opinion slip op. 1153 at 1157-1158, ____ F.2d____ at _____ [manuscript pp. 7-8].

This is factually highlighted by the following excerpts from Jackson's state complaint:

> It was Texas Employers' Insurance Association's duty under the Longshoreman & Harbor Worker's Compensation Act to pay Leroy Jackson disability benefits.
>
> . . . .
>
> This suit is also filed as a result of Defendant's tortious breach of their common-law duty to act with care, skill, reasonable expedience and faithfulness in the performance of their duties under the Longshoreman & Harbor Worker's Compensation Act.
>
> . . . The Longshoreman & Harbor Worker's Compensation Act imposes a duty upon Defendant to perform with care, skill, reasonable expedience and faithfulness its duties as set forth under the Act.
>
> . . . .
>
> . . . They misrepresented material facts to a variety of people, these misrepresentations were relied on and they were relied on to the detriment of Leroy Jackson. These misrepresentations were intentional and designed to defraud Leroy Jackson of his rights under the Longshoreman & Harbor Worker's Compensation Act and his compensation benefits. . . .

due by TEIA, no medical benefits had to be furnished by TEIA. Without the LHWCA there was no basis whatever for any relief. His claim became even more specific in terms of LHWCA by his assertion that (i) he was entitled to prompt payment of compensation benefits and (ii) the exercise by TEIA of its statutory right to file a controversion was in bad faith under and in violation of Texas standards.

The result is that TEIA could have removed this case to the same federal District Court that granted the aborted injunction and declaratory judgment. In no way do I suggest that its failure to be removed now affords it a right to ignore the Anti-Injunction Act. But now things are quite different. No longer is it just a case which can properly be filed and tried in the state court. Now it is a case which was initially one properly triable in the Federal District Court. For that same Federal Court to grant a declaratory order that the state case is preempted by LHWCA is not an unseemly intrusion into an independent tribunal. The absence of intrusion distinguishes the situation in which declaratory relief is held unavailable on the analogy of the Anti-Injunction Act because of like intrusive effect.

I therefore dissent.

Defendant, its agents, servants and/or employees have committed the tort of intentional infliction of emotional distress. . . . These acts and steps were specifically aimed at defrauding Leroy Jackson of his rights under the Longshoreman & Harbor Worker's Compensation Act . . . .

Defendant, its agents, servants and/or employees, negligently inflicted emotional distress on Leroy Jackson. . . . They negligently took these steps in an effort to deny Leroy Jackson compensation benefits rightfully due to him under the Longshoreman & Harbor Worker's Compensation Act.

B. Opinion of the Fifth Circuit Panel

TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Plaintiff-Appellee,

v.

Leroy JACKSON, Defendant-Appellant.

Nos. 85-2583, 85-2690.

United States Court of Appeals, Fifth Circuit

July 15, 1987.

Employer's Longshore and Harbor Workers' Compensation Act carrier sought declaratory judgment and permanent injunction against employee from continuing to assert and to prosecute bad-faith insurance practice suit in state court. The United States District Court, Eastern District of Texas, 618 F.Supp. 1316, Howell Cobb, J., entered an order permanently enjoining employee from prosecuting state court suit and declaring that Act preempts state law causes of action arising from handling of compensation payments under Act. Employee appealed. The Court of Appeals, Brown, Circuit Judge, held that: (1) Act preempted Texas state law governing bad-faith insurance practices; (2) order permanently enjoining employee from prosecuting state court suit violated Anti-Injunction Act; (3) Longshore and Harbor Workers' compensation Act is so preemptive as to create federal question jurisdiction; (4) action was proper for declaratory Judgment, assuming no full faith and credit bar; and (5) state court's ruling denying carrier's plea in bar, which asserted that employee's state claims were barred by exclusivity provisions of Act, was interlocutory order and was not appealable under Texas law, so that state

court's ruling was not entitled to preclusive effect under full faith and credit.

Affirmed in part; vacated in part.

Edith H. Jones, J., dissented and filed opinion.

Richard Schechter, Schechter, Eisenman & Solar, Houston, Tex., for defendant-appellant.

,Reagan Wm. Simpson, Houston, Tex., Arthur R. Miller, Cambridge, Mass., Steven Lynn Roberts, Stephen Pate, Fulbright & Jaworski, Houston, Tex., for plaintiff-appellee.

Appeals from the United States District Court for the Eastern District of Texas.

Before BROWN, REAVLEY and JONES, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This case lies at the point where federalism and the Anti-Injunction Act intersect with preemption and the Declaratory Judgment Act. The question is whether the Longshore and Harbor Workers Compensation Act (LHWCA) preempts a state law cause of action for the bad faith withholding of compensation benefits. We affirm the District Court's declaratory judgment that the LHWCA is preemptive, but reverse the injunction staying the state court proceedings.

A Tale of Two Lawsuits

Appellant Leroy Jackson, an employee covered by the LHWCA, 33 U.S.C. §§ 901-950, injured his back and

right ankle on July 12, 1978 while in the employ of Gulfport Shipbuilding Company in Port Arthur, Texas. Jackson received medical treatment and returned to work on October 30 of that year. During the following three and one-half years, Jackson continued at his shipfitting duties but occasional recurring bouts of back pain related to his July 1978 accident forced him periodically to seek additional medical treatment. Four times between October 1978 and May 1982, Jackson received medical treatment for his back condition and was absent from work for periods ranging from about six to about fifteen weeks.

At the time of Jackson's injury, Gulfport Shipbuilding was an employer subject to the LHWCA. As Gulfport's LHWCA carrier, Texas Employers' Insurance Association (TEIA) paid for Jackson's medical treatment and paid him temporary total disability benefits during those periods when Jackson was unable to work.

On May 3, 1982, Jackson seriously reinjured his back while at work and has not returned to work since. On July 6, 1982, Jackson filed a formal claim for permanent disability benefits. *See* 33 U.S.C. § 908. Shortly thereafter, on July 23, TEIA filed the first of several formal controversions,[1] this one on the basis that Jackson had

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1. A controversion is the statutory challenge to a claim for benefits made under the LHWCA. *See* 33 U.S.C. § 914(d).

> If the employer does not believe that an employee is eligible for benefits under the Act, Section 14(a) [33 U.S.C. § 914(a)] relieves him of the obligation to begin making compensation payments so long as he promptly controverts the claim. The employer must file a U.S. Department of Labor . . . from . . . on or before the fourteenth day after he receives notice or has knowledge of the alleged injury or death. The notice must state the names of the claimant and employer, the date of injury or death and the reasons for controverting the right to compensation.

1A *Benedict on Admiralty* § 77c (6th ed. 1986) (footnotes omitted).

not yet reached maximum medical improvement, and thus it was unknown whether his disability would indeed be permanent. Despite its filing of the controversion, TEIA did not suspend payment of Jackson's benefits until April 4, 1983.

On July 6, 1983, in an informal conference before the Deputy Commissioner, TEIA agreed to, and did, resume Jackson's payments. Jackson was re-examined by a physician in mid-August 1983, and on September 14, TEIA again filed a controversion and suspended Jackson's benefits, this time on the stated basis that Jackson's disability was due to a continuing arthritic condition and not the result of his 1978 back injury. On September 28, 1983, a second informal conference was held, this time before a Claims Examiner. The next day, September 29, TEIA filed a third controversion, here challenging the Claims Examiner's recommendation for payment of compensation. As provided under the Act, 33 U.S.C. § 919, Jackson's claim went to a formal hearing before an ALJ on May 3, 1984.

Jackson Goes to the State Court

On June 5, 1984, while the decision of the ALJ was pending, Jackson filed a lawsuit against TEIA[2] in Texas state court. Jackson's original petition contained seven causes of action generally alleging bad faith insurance practices on the part of TEIA, and it requested $1.5 million in actual damages and $15 million in punitive

2. The LHWCA equates employers and their insurance carriers for purposes of the Act. 33 U.S.C. § 935; *see also* 20 C.F.R. § 703.115. In this opinion, we shall refer in some places to employers, in others to insurers, and in yet others to both, but for the purposes of our discussion, it is not necessary to distinguish between them.

damages. TEIA answered the lawsuit, and extensive discovery ensued.

On September 14, 1984, the ALJ who heard Jackson's claim issued a final decision and order declaring Jackson to be totally and permanently disabled and ordered payment of compensation benefits, attorney's fees, and interest on all past unpaid amounts. Neither party appealed the ALJ's decision and the order became final. *See* 33 U.S.C. § 921.

Even though the ALJ had decided his claim favorably, Jackson nevertheless pressed on with the state court case. In January 1985, the state trial court denied TEIA's plea in bar, which had asserted that Jackson's state claims were barred by the exclusivity provisions of the LHWCA.

TEIA Goes to the Federal Court

In June 1985, TEIA filed the instant suit in federal district court. TEIA sought two declaratory judgments: (i) the LHWCA preempted Jackson's state bad faith insurance practices action and (ii) the ALJ's decision was res judicata with respect to Jackson's challenge to the manner in which TEIA handled his LHWCA claim. TEIA also sought an injunction prohibiting Jackson from proceeding with his state action. In August 1985, the District Court enjoined Jackson from further proceeding in state court. In September 1985, the District Court entered a subsequent order, permanently enjoining Jackson from prosecuting his state court suit and declaring that the LHWCA preempts the state law causes of action arising from the handling of compensation payments under the Act. 618 F.Supp. 1316. The state trial remains stayed. Jackson appeals.

The Preeminence of Preemption

[1, 2] We first consider whether Jackson's state law claims are preempted by the LHWCA. Federal law will be found to preempt state law in three different instances. First, Congress may explicitly express its intent to preempt state law. *Shaw v. Delta Air Lines,* 463 U.S. 85, 95, 103 S. Ct. 2890, 2899, 77 L.Ed.2d 490, 500 (1983). Second, Congress' intent to displace state law may be inferred, generally through the comprehensiveness or pervasiveness of the federal regulatory scheme. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947). Finally, even where Congress has not entirely displaced state law, federal law will nevertheless preempt state law when state law conflicts with federal law, *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248, 257 (1963), or when state law interferes with the accomplishment and execution of the congressional purpose, *Hines v. Davidowitz,* 312 U.S. 52, 67-68, 61 S. Ct. 399, 404, 85 L.Ed. 581, 587 (1941). *See Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.,* 467 U.S. 461, 104 S. Ct. 2518, 2523, 81 L.Ed.2d 399, 406 (1984) (summarizing three types of preemption). Although any one of three bases would be sufficient to establish preemption, we agree with the District Court that, on all of these bases, the LHWCA preempts the Texas state law invoked by Jackson.

(i) Congressional Intent to Preempt

With respect to explicit congressional intent to preempt state law, we look to § 5(a) of the Act, 33 U.S.C.

§ 905(a), which provides that the employer's liability "shall be exclusive and in place of all other liability of such employer." The liability referred to in this section arguably refers only to the employer's liability for medical treatment, compensation benefits for disability, and death, *see* 33 U.S.C. §§ 904, 907, 908, 909, but in light of the carefully crafted and comprehensive statutory compensation scheme contained in the LHWCA, we read § 5 broadly as an indication of Congress' intent to preempt state law that significantly conflicts with any portion of the Act, including the payment of compensation benefits, the provision of medical care, and the timing of such payments. *See Sample v. Johnson,* 771 F.2d 1335, 1346-47 (9th Cir. 1985) (§ 5(a)'s preemptive effect should be construed broadly in light of the traditional interpretation lent to workers compensation statutes), *cert. denied,* ____U.S.____, 106 S. Ct. 1206, 89 L.Ed.2d 319 (1986); *Hall v. C & P Telephone Co.,* 793 F.2d 1354 (D.C. Cir. 1986) (LHWCA is preemptive and bars any court from taking jurisdiction of independent civil tort claims), *citing Garrett v. Washington Air Compressor Co.,* 466 A.2d 462 (D.C. 1983).

(ii) Comprehensiveness of Federal Scheme

Federal law will also preempt state law if the sheer comprehensiveness of the federal regulatory scheme warrants the inference of congressional intent to preempt. The LHWCA,[3] born of much judicial travail and con-

3. The Act was substantially amended in 1972 and again in 1984. *See* LHWCA Amendments of 1972, Pub. L. 92-576, 86 Stat. 1251, and LHWCA Amendments of 1984, Pub. L. 98-426, 98 Stat. 1639.

tention among the states, Congress, and the Supreme Court,[4] was established as a uniform national program of workers compensation benefits for longshore and harbor workers which could not be constitutionally provided by the States. The program is administered by the Secretary of Labor through the Director of Office of Workers' Compensation Programs. 33 U.S.C. § 939. It is routinely handled by regional Deputy Commissioners, who no longer have any adjudicative duties or powers. Controverted cases are now heard by an ALJ. Appeals of compensation orders are handled first by a review board in the Department of Labor, 33 U.S.C. § 921, and then by federal courts of appeals, 33 U.S.C. § 921(c). Unlike their former role as the first step in appellate review, federal district courts now are confined to enforcing compensation orders. 33 U.S.C. §§ 918, 921(d). Unlike many workers compensation acts that require repeated court enforcement, the LHWCA is almost self-executing, self-policing.

Thus, of great significance for this case, the LHWCA provides for automatic payment of benefits, and further provides for express penalties for an employer's failure to pay benefits. 33 U.S.C. §§ 914, 938. Under the authority of the LHWCA, the Secretary of Labor has promulgated a detailed set of regulations implementing all portions of the Act. *See* 20 C.F.R. §§ 701-704 (1980). Portions of these regulations are directed specifically toward carriers that issue LHWCA insurance. *See* 20

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4. The story has been many times told. *See, e.g., Southern P. Co. v. Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L.Ed. 1086 (1917); *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 40 S. Ct. 438, 64 L.Ed. 834 (1920); *Washington v. Dawson & Co.,* 264 U.S. 219, 44 S. Ct. 302, 68 L.Ed. 646 (1924); *Panama R.R. Co. v. Johnson,* 264 U.S. 375, 44 S. Ct. 391, 68 L.Ed. 748 (1924).

C.F.R. §§ 703.101-703.503 (1980). In a nut-shell, it is difficult to imagine a more comprehensive scheme of federal regulation—one that leaves no room for state involvement—than that contained in the LHWCA.

(iii) State Law Conflicts with Federal Law

The third instance in which federal law will be found to preempt state law occurs when state law either conflicts with federal law or interferes with the accomplishment or execution of the purpose behind federal law. In this case, we believe that the intrusion of a state tort claim would interfere with the regulatory program established by Congress.

Recognition of such state claims would inject numerous conflicting "bad faith" standards into an otherwise uniform national system. In addition, such claims would interfere with the penalty provisions that Congress included in the LHWCA. Section 14(a) of the Act, 33 U.S.C. § 914(a) provides that "[c]ompensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, *except where liability to pay compensation is controverted by the empolyer*" (emphasis added). Section 14(e), 33 U.S.C. § 914(e), further provides that

> [i]f any installment of compensation payable without an award is not paid within fourteen days after it becomes due, . . . there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, *unless notice*

> *is filed under subsection (d) of this section* [the controversion section]. . . .[5]

(Emphasis added). Thus, where the employer controverts a claim, it is expressly relieved from paying either the disputed compensation or the 10% penalty for nonpayment.

Controversy over Controversion

Significantly, both before and after the enactment of the 1984 LHWCA amendments,[6] Congress rejected serious proposals to impose expressly an obligation of good faith on the right to file a controversion and to create a specific cause of action for wrongful controversion. In response to repeated complaints by organized labor about arbitrary controversions, Congress (although rejecting these more extreme measures), in 1984 added a provision to the LHWCA creating criminal penalties for the fraudulent denial of benefits, *see* 33 U.S.C. § 931(c) (providing for a fine of up to $10,000 and for imprisonment for up to five years for knowingly making a false statement in order to reduce, deny, or terminate benefits). Nevertheless, in the face of these pressures, Congress, in

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5. Once a claimant has been found entitled to compensation, additional penalties are sanctioned under the LHWCA:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

33 U.S.C. § 914(f).

6. Jackson's claim arose before the enactment of the 1984 amendments (see note 3 *supra*) and is thus governed by the pre-1984 version of the LHWCA.

its 1984 amendments, left unchanged the unfettered right of the employer to file the formal controversion which automatically permits the carrier to suspend compensation benefits. While ordinarily inferring pre-1984 intent from what Congress did or did not do in 1984 is a doubtful undertaking, the very issues of unreasonable controversions by employers and the asserted necessity of sanctions to prohibit or prevent them were before Congress as it considered its extensive 1984 Amendments to the LHWCA. This legislative history demonstrates at least that Congress was willing to leave the structure as it was, by which the right to file a formal controversion is unconditioned, subject only to severe criminal penalties for making a false statement in conjunction with such a controversion. *See generally Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources,* 97th Cong., 1st Sess. 433 (1981).

Help from § 301 and Lueck

Our conclusion that Jackson's state tort claims are preempted by the LHWCA is supported by the recent Supreme Court decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 105 S. Ct. 1904, 85 L.Ed.2d 206 (1985). In *Lueck,* an employee brought in state court a common law tort claim for bad faith failure to pay disability benefits against his employer and his employer's insurer. The employee complained that both defendants had intentionally and repeatedly failed to make disability payments to him under a disability plan negotiated as part of a collective bargaining agreement by the employer and the employee's union. The Wisconsin Supreme Court

held that the employee's action could proceed in state court. The Supreme Court granted certiorari to determine whether § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), preempted the state tort claim.

The Supreme Court held that the state claim was preempted. The Court emphasized the importance of national uniformity in giving meaning to the terms of collective bargaining agreements. "Unless federal law governs that claim, the meaning of the health and disability-benefit provisions of the labor agreement would be subject to varying interpretations, and the congressional goal of a unified federal body of labor-contract law would be subverted." *Lueck,* 471 U.S. at 220, 105 S. Ct. at 1916, 85 L.Ed.2d at 221; *see also Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 82 S. Ct. 571, 7 L.Ed.2d 593 (1962). "[I]t is a question of federal contract interpretation whether there was an obligation under this contract to provide the payments in a timely manner, and, if so, whether [the employer's] conduct breached that implied contract provision." *Lueck,* 471 U.S. at 215, 105 S. Ct. at 1913, 85 L.Ed.2d at 218. The Court also rejected the employee's claim that, characterizing his suit as one grounded in tort rather than in contract, was sufficient to remove it from the LMRA's preemptive reach.

> [Q]uestions relating to what the parties to a labor agreement agree, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Id. at 211, 105 S. Ct. at 1911, 85 L.Ed.2d at 215. Finally, the Court asserted that its holding was necessary to preserve the role of arbitration in labor-management relations. Allowing employees to bypass the grievance procedure by going directly to state court would subvert the mediation process and "eviserate a central tenet of federal labor-contract law." *Id.* at 220, 105 S. Ct. at 1915-16, 85 L.Ed.2d at 220-21.

Although the Supreme Court purported not to decide whether a state bad faith failure to pay a tort claim would be preempted by "other federal laws governing employment or benefit plans," the reasoning in *Lueck* is just as compelling, if not more so, when applied to the situation of the instant case. In the LHWCA, Congress established a nationwide compensation program with precise mechanisms for the provision and payment of benefits, the handling of controversies over payment, and the penalties for nonperformance. We are no more willing to allow state court tort law to intrude upon this uniform federal compensation program than the Supreme Court was inclined to allow state court tort law to intrude upon a federally controlled collective bargaining agreement. The obligation to provide compensation benefits and the mechanism to contest liability for such benefits are dictated by federal law. Thus, as with the meaning of the labor contract provisions in *Lueck*, federal law and prescribed federal mechanisms must determine the meaning and application of the provisions of the LHWCA.

Further, the instant case provides a stronger argument for preemption than did *Lueck*. In *Lueck*, the state court tort action arose from an interpretation of a privately negotiated agreement, some of whose substantive provisions were not dictated by federal law. Here the collision

between Congress and the state court arises not from a contract negotiated under the auspices of the Act but from the terms of the Act itself.

Fifth Differs with First

In support of his position that his state tort claim is not preempted, Jackson urges us to adopt the reasoning of *Martin v. Travelers Insurance Co.*, 497 F.2d 329 (1st Cir. 1974). In *Martin*, an LHWCA claimant brought a common law claim for infliction of emotional distress against the LHWCA carrier in federal court. The facts in *Martin* were particularly egregious. The claimant had recevied three LHWCA compensation checks, which he deposited and drew against. The insurer, evidently deciding to appeal, stopped payments on the checks. Claimant had no knowledge of the stop order. The result was financial hardship and emotional distress to the claimant.

The court held that the claimant's cause of action was not preempted. It read the exclusivity provision in § 5 of the Act, 33 U.S.C. § 905, as applying only to injuries arising from the employee's injury or death, but not to a cause of action arising out of the manner in which compensation payments are made. The court in *Martin* also read § 5 to limit only the liability of an employer, not an employer's insurer.

[3, 4] As we stated above, we read the exclusivity language in § 5 broadly in order to effectuate the comprehensive statutory compensation scheme contained in the Act. *See LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985) (simply because retaliatory discharge provision of LHWCA is not included in LHWCA's exclusivity provision does not mean that plaintiff was free

to bring retaliatory discharge claim under state law). As we also stated above, we read the Act so that the rights and obligations of the employer's insurer are congruent with those of the employer. *See* 33 U.S.C. § 935; 20 C.F.R. § 703.115. We further believe that the Supreme Court's 1985 decision in *Lueck* effectively refutes the reasoning behind the *Martin* decision. Therefore, with deference, we decline to follow the First Circuit lead.

McCarran No Obstacle

Jackson also argues that the McCarran Act, 15 U.S.C. §§ 1011-1015, leaves to the states the business of regulating insurance, including the business of determining the manner in which insurance payments are made. Section 1012(b) of Title 15 states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance."

[5] Insofar as the matters presented in the instant case are concerned, we hold that the LHWCA "specifically relates to the business of insurance" and thus falls outside the area left to the exclusive regulation of the states. Numerous provisions of the LHWCA relate specifically to insurance carriers, and through § 35 of the Act, 33 U.S.C. § 935, the duties imposed upon employers are deemed imposed upon the insurers of employers. *See also* 20 C.F.R. § 703.115. The regulations implementing the LHWCA address at length the insurers' obligations under the Act. *See* 20 C.F.R. § 703. This level of regulation of insurance carriers leaves no doubt that the LHWCA "specifically relates to the business of insurance."

In light of each of the above considerations, we conclude that Jackson's Texas state law claims are precluded by the LHWCA. Jackson's exclusive remedy for failure to pay his claims arises under the LHWCA. We therefore affirm the District Court in holding Jackson's state law claims to be preempted.

Enjoined from Enjoining

[6] The District Court concluded that Jackson's state law claims were preempted by the LHWCA, and permanently enjoined Jackson from proceeding with those claims in state court. In light of controlling Supreme Court precedent, however, we vacate the injunction, holding that it violates the Anti-Injunction Act, 28 U.S.C. § 2283.

The Anti-Injunction Act states that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except [i] as expressly authorized by Act of Congress, or [ii] where necessary in aid of its jurisdiction, or [iii] to protect or effectuate its judgments."[7] The District Court held that the injunction issued in this case was authorized by the first and third of the stated exceptions. Jackson challenges the issuance of the injunction as contrary to established case law. We agree.

(i) Expressly Authorized by Congress

[7] The standard for determining when an injunction of a state court proceeding is "[i] expressly authorized by Act of Congress" is laid out in *Mitchum v. Foster,*

7. We have inserted the brackets in the statutory language for the convenience of reference.

407 U.S. 225, 92 S. Ct. 2151, 32 L.Ed.2d 705 (1971). The statutory authorization need not refer expressly to § 2283, *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 516, 75 S. Ct. 452, 455, 99 L.Ed. 600, 608 (1955), nor need it expressly authorize an injunction of a state court proceeding, *Mitchum*, 407 U.S. at 237, 92 S. Ct. at 2159, 32 L.Ed.2d at 714. "[A]n Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. . . . The test is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *Id.* at 237-38, 92 S. Ct. at 2159-60, 32 L.Ed.2d at 714-15 (footnote omitted).

Mitchum was a civil rights case brought under 42 U.S.C. § 1983. After undertaking a review of the legislative history of that statute, the Supreme Court found that injunctive power was necessary to ensure that § 1983 be given its intended scope of protecting the civil rights of citizens in their state courts.

A similar inquiry was made in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S. Ct. 2881, 53 L.Ed.2d 1009 (1977). Although *Lektro-Vend* in some ways muddled the "expressly authorized" doctrine, it did reemphasize the importance of legislative history in finding such an exception. In *Lektro-Vend*, the plurality opinion determined that the legislative history of the Clayton Act did not demonstrate that Congress intended for the injunctive relief provision of the Clayton Act to constitute an express exception to the Anti-Injunction Act.

[8] The law is clear that a federal court cannot enjoin a state court proceeding "merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 294, 90 S. Ct. 1739, 1747, 26 L.Ed.2d 234, 245 (1970). "This rule applies regardless of whether the federal court itself has jurisdiction over the controversy or whether it is ousted from jurisdiction for the same reason that the state court is." *Id.*

[9] A distillation of these cases, thus, yields this rule: to justify finding that a statute contains an expressly authorized exception to the Anti-Injunction Act, a court must find that Congress explicitly recognized that state courts would, or would be used by others to, invade areas protected by federal law and second, that the only way to give the federal law its full meaning and scope is to enjoin such state court proceedings.

The District Court made no findings on the first prong. It instead focused only on the primacy of a national, uniform scheme of LHWCA coverage, equating that concern with the "full scope" element. The proper inquiry would have been whether Congress recognized that the state courts would so frustrate or destroy the LHWCA's objective that the statute's full scope could be achieved only by enjoining state actions. That inquiry was not made. The District Court's emphasis on the national uniformity of the LHWCA is relevant to a determination of preemption, which we have affirmed. By its own force, however, that determination cannot then properly be extrapolated into an express authorization exception under

the Anti-Injunction Act. Accordingly, the District Court erred in so holding.

(iii) To Protect or Effectuate Judgments[8]

The District Court also held that its injunction was authorized by § 2283 as one necessary "[iii] to protect or effectuate [the] judgments" of the federal courts. According to the District Court, the federal court's judgment to be protected in this case was the final decision of the ALJ granting compensation, plus interest and attorney's fees, to Jackson. The District Court held the award of attorneys' fees and interest to be a "penalty" against TEIA, and res judicata as to wrongful withholding claims. The court held that the fee award precluded all litigation of TEIA's liability for its questionable handling of the claim, including the pending state case. We disagree. The issues alleged in state court of bad faith, fraud, infliction of emotional distress, *et al.* were simply not before the ALJ. A finding of res judicata on these issues based on the ALJ's final order is unfounded.

[10] The relitigation exception is construed narrowly.[9] It authorizes injunctions on matters that have been finally decided by a federal court. Res judicata may also bar state litigation on a part of the claim that could have been, but was not, determined in the federal case.

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8. The second exception (ii) to the Anti-Injunction Act, "necessary in aid of jurisdiction" was not relied upon by the District Court, and has not been urged by Jackson on appeal.

9. *See, e.g., In Re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir. 1981), *cert. denied,* 456 U.S. 936, 102 S. Ct. 1993, 72 L.Ed.2d 456 (1982); *Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1980); *Seaboard Coast Line Railroad Co. v. Union Camp Corp.,* 613 F.2d 604 (5th Cir.), *cert. denied,* 449 U.S. 835, 101 S. Ct. 107, 66 L.Ed.2d 41 (1980).

The issues charged in the state court case, unrelated directly to Jackson's waterfront injury, were not before, and thus not decided by, the ALJ. Res judicata is applicable in an administrative proceeding[10] only when "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate." *United States v. Utah Construction Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L.Ed.2d 642, 661 (1966). *See also, United States v. RCA*, 358 U.S. 334, 79 S. Ct. 457, 3 L.Ed.2d 354 (1959).

In this case, TEIA, bearing the burden of establishing exception (iii) of the Act, made no showing that there was any litigation of these state claims or issues before the ALJ. The fact that, unopposed by TEIA, the ALJ made an award of costs and fees—items precisely allowable under the LHWCA—to Jackson, is not by any stretch a "final determination" on the issues of bad faith or fraud.[11] Whether the LHWCA preempts any court, federal or state, from hearing and determining Jackson's tort claim is not the pertinent inquiry here. Preemption is not equal to res judicata. We are concerned rather

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10. We leapfrog the initial hurdle, over which the parties have argued vigorously, of whether a final agency order, reviewable in federal court, can constitute a "judgment of a federal court" for purposes of § 2283. Resolution of that issue is not essential for our decision. The delicate balancing required in such an inquiry is better suited to a case squarely presenting and turning on that issue.

11. The sum total of attention the ALJ devoted to this "litigated" issue is as follows: "*Attorney Fees.* Claimant's counsel's fee petition requesting $6,250.00 for 50.50 hours of legal services rendered since referral to this Office has been received, plus $790.51 in costs. Respondents have not advised they object to the petitioned fee. Therefore the fee requested is approved plus costs." ALJ Order, 9/24/84 (Record at 19). The award was not expressly made pursuant to any statute, although §§ 928(a) & (b) permit such an award.

with the question whether an award of interest and fees can be spun into a fully litigated issue of bad faith eligible for the relitigation exception to the Anti-Injunction Act. We hold that it cannot.

We recognize that a finding of preemption coupled with an inability to coercively enforce that finding is paradoxical, to say the least. Nevertheless, it is only emblematic of the prized value we have historically place on the principles of federalism and comity.[12]

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12. Since the District Court granted the injunction, the Supreme Court decided a case bearing on the relitigation exception. In *Parsons Steel v. First Alabama Bank,* 474 U.S. 518, 106 S. Ct. 768, 88 L.Ed. 2d 877 (1986), the Court held that once the state court has expressly rejected a claim of res judicata, the Full Faith and Credit Act, 28 U.S.C. § 1738, bars a federal court from enjoining a state action in order to protect a prior federal judgment.

In this case, TEIA filed a plea in bar in state court. The state court held a special hearing on TEIA's motion, and rejected it. The state case, however, was enjoined before going to trial and final judgment. Thus, the effect of *Parsons Steel* on the instant case is unclear. *Parsons Steel* is limited to issues in which "the state court has *finally rejected* a claim of res judicata." 474 U.S. at ___, 106 S. Ct. at 772, 88 L.Ed.2d at 884 (emphasis added). Whether the state court's rejection of TEIA's res judicata argument was "final" enough—even though the case had not gone to trial—to serve as an independent bar to the relitigation exception is a question of state law. *See, e.g., Van Dyke v. Boswell, O'Toole, Davis & Pickering,* 697 S.W.2d 381, 385 (Tex. 1985) ("test for finality is whether the conclusion in question is procedurally definite and subject to appeal."); *Green Oaks Apts., Ltd. v. Cannan,* 696 S.W.2d 415, 418 (Tex. Ct. App. 1984) (only final judgment can support a plea of res judicata); *Whitmire v. Kriegel,* 678 S.W.2d 567, 569 (Tex. Ct. App. 1984) (same).

The District Court ignored the state court's rejection of TEIA's res judicata claim. Nevertheless, since we have already found that the ALJ did not adjudicate the bad faith claims, we need not reach the issue of the retroactive effect of *Parsons Steel* on the District Court's action. The bearing of *Parsons Steel* on the propriety of granting declaratory relief is discussed *infra.*

Federal Question Jurisdiction: Present and Accounted for

[11] As we have discussed, none of the three exceptions to the Anti-Injunction Act are clearly available in this case. Accordingly, we defer to the time-honored rule that "[a]ny doubts as to the propriety of a federal injunction against the state court proceedings should be resolved in favor of permitting state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S. Ct. 1739, 1748, 26 L.Ed.2d 234, 246-47 (1970). As our foregoing discussion demonstrates, to determine whether a federal court injunction could be granted, it was necessary that we first determine the underlying question of preemption by the LHWCA. We therefore affirm the District Court's declaratory judgment[13] that Congress has preempted the entire field of compensation awarded under the LHWCA, 474 U.S. 518, 106 S. Ct. 768, 88 L.Ed.2d 877 (1986).

At this point, we wish to address certain issues that may be raised concerning our jurisdiction. We recognize that although this area of law may not be crystal-clear, the Supreme Court recognizes that there is room for disagreement. For example, one possible argument is that

13. The language of the District Court's declaration is as follows: The action of the Defendant presently pending in the State of Texas District Court of Jefferson County, which asserts various theories of recovery based upon the manner in which the Plaintiff handled Defendant's claim for compensation and other benefits under the Longshore and Harbor Workers' Compensation Act ("the Longshore Act") 33 U.S.C. § 901, et seq., is preempted by the Longshore Act. Any remedy Defendant may have for the alleged conduct of the Plaintiff in handling that claim is restricted to the recoveries provided for in the Longshore Act. Record at 223-24.

this case raises the evil spectre of the well-pleaded complain rule. And indeed, there is language in some cases lending support for that contention. In *Louisville & Nashville Railroad Co. v. Mottley,* 211 U.S. 149, 29 S. Ct. 42, 53 L.Ed. 126 (1908), the Supreme Court held that a federal court cannot take jurisdiction of a case as one "arising under" federal law if the federal issue will be raised only as a defense to the opposing party's state law claim.

The well-pleaded complaint rule has been knitted into the Declaratory Judgment Act, although not without dropping a stitch or two. As one thoughtful commentator explains, "the effect of the well-pleaded complaint rule in preemption cases is complicated. *Mottley* presented a situation in which the plaintiff sued under state contract law and the defendant relied on preemption as a defense. In this case, the Court understandably treated preemption as a defense to a state-law claim. The result is not quite so understandable in declaratory judgment actions, in which the *Mottley* rule has been applied to bar suits presenting preemption claims raised by plaintiffs." Note, *Federal Jurisdiction Over Preemption Claims: A Post-*Franchise Tax Board *Analysis,* 62 Tex. L. Rev. 893, 898 (1984).

In the past, *Mottley* and the well-pleaded complaint rule have often acted to defeat jurisdiction in declaratory judgment actions. *See Merrell Dow Pharmaceuticals Inc. v. Thompson,* ____U.S.____, ____, 106 S. Ct. 3229, 3235, 92 L.Ed.2d 650, 661 (1986) ("the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"); *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 16, 103 S. Ct. 2841, 2850, 77 L.Ed.2d 420, 435

(1983) (" 'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.' "), quoting 10A C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure § 2767 at 744-45 (2d ed. 1983); *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 248, 73 S. Ct. 236, 242-43, 97 L.Ed. 291, 298 (1952) ("it is doubtful if a federal court may entertain an action for declaratory judgment establishing a defense to [a pending or threatened state based] claim"); *Powers v. South Central United Food & Commercial Workers Unions,* 719 F.2d 760, 764 (5th Cir. 1983) ("an asserted or anticipated defense predicated on federal preemption of state law is, in jurisdictional terms, a defense like any other and will not serve to invoke federal jurisdiction").

We feel certain, however, that this negative characterization is dispelled by a proper review of the case law. To begin with, we point out another analogy to the Labor Management Relations Act. (See discussion of LMRA and *Lueck* case, *supra.*) In *Avco Corp. v. Machinists,* 376 F.2d 337 (6th Cir. 1967), *aff'd,* 390 U.S. 557, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968), the plaintiff employee filed suit in state court alleging that the defendant union had breached its "contract" by sanctioning work stoppages. The employee sought temporary and permanent injunctions. Clearly, the plaintiff had a federal cause of action under § 301 of the LMRA, if he desired it. The union then sought to remove the case to federal court, over the employee's objections.

The court of appeals held, and the Supreme Court affirmed, that the employee's action "arose under" § 301, and thus the union's motion to remove the case to federal

court was proper. (The removal statute, like the declaratory judgment statute, is procedural and derivative only. An independent basis of jurisdiction must be established in either removal or declaratory judgment actions.) The necessary ground of decision in *Avco* was that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violations of contracts between an employer and a labor organization. . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. . . . *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board,* 463 U.S. at 23-24, 103 S. Ct. at 2853, 77 L.Ed.2d at 440.

In addition, we have a bright new lodestar to guide our course. In a very recent decision, the Supreme Court has continued the trend begun nearly 20 years ago in *Avco.* In *Metropolitan Life Ins. Co. v. Taylor,* ___U.S. ___, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987), the Court affirmed the vitality of *Avco* and extended the *Avco*-LMRA exception to analogous ERISA cases. After setting out the general nature of the well-pleaded complaint rule, the Court states

> One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-exempt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character. For 20 years [since *Avco*], this Court has singled out claims

> pre-exempted by § 301 of the Labor Relations Management Act for such special treatment.
>
> . . .
>
> The question thus resolves itself into whether or not the *Avco* principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by § 502(a)(1)(B) [the section conferring private causes of action under ERISA] as an action arising under federal law.

___U.S. at ___, 107 S. Ct. at 1546-47, 95 L.Ed.2d at 63.

To answer that question, the Court resorted to a comparison of the legislative history of ERISA and the LMRA. Focusing on similar language in the statutes' enforcement provisions, and emphasizing that both are broad labor law acts, the Court found with little difficulty, that Congress has conferred federal jurisdiction in cases with such overarching federal, legislatively declared, interests. Accordingly, the Court concluded that *Taylor,* although "purport[ing] to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress." *Id.* at ___, 107 S. Ct. at 1548, 95 L.Ed.2d at 65.[14]

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14. Only a few illustrations are necessary to reveal how pervasive is the LHWCA and how destructive an interference are Jackson's state asserted claims. For example, in Paragraph VII of Jackson's state court complaint, Jackson purports to invoke Article 21.21 of the Texas Insurance Code in pleading that "three times the amount of actual damages be awarded as a matter of law." Yet § 905 of the LHWCA provides that the liability prescribed under the Act "shall be exclusive and in place of all other liability. . . ."

Jackson also abrogates the congressionally established scheme of LHWCA economic rights and limitations in Paragraph XIV of his complaint. There, he invokes the Texas Deceptive Trade Practices Act seeking "as a matter of law [that] damages be trebled."

[12] Our question, then, is whether the LHWCA is powerful enough to satisfy the principle of *Avco* and *Taylor:* stated differently, is the Longshore Act entitled to the same federal protection as are the LMRA and ERISA. It is a question easily answered in the affirmative. The Court focuses on the "explicit direction" from Congress—both in statute and legislative history—that demonstrates its intent utterly to "displace" state law in establishing federal question jurisdiction.[15] As we have set out above, in some detail, the LHWCA, springing originally from the impecably federal province of admiralty jurisdiction, has continued, unquestioned through fifty years of congressional monitoring, to remain squarely under the protection of federal jurisdiction. A review of the LHWCA and its legislative history yields at least as strong "explicit direction." Even without such "explicit direction," however, the Court recognizes that federal-

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15. One indicator utilized by the Supreme Court to establish such a power of displacement is whether Congress has conferred a private cause of action. *See Avco* 390 U.S. at 560, 88 S. Ct. at 1237, 20 L.Ed.2d at 129; *Taylor,* _____ U.S. at _____, 107 S. Ct. at 1547, 95 L.Ed.2d at 63. By contrast, in *Merrell Dow Pharmaceuticals Inc. v. Thompson,* _____U.S._____, 106 S. Ct. 3229, 92 L.Ed.2d 650 (1986), the Supreme Court rejected the argument that a state-based claim arose under federal law because the state law incorporated its standard of care from a federal statute, which itself provided no private cause of action. *See also, Oliver v. Trunkline Gas Co.,* 796 F.2d 86, 89 (5th Cir. 1986) (dispute over private contract incorporating federal regulation does not create federal-question jurisdiction).

Unlike the federal Food, Drug and Cosmetic Act at issue in *Merrell Dow,* the LHWCA provides an exclusive means by which to challenge, and recover for, wrongful controversion. *See* 33 U.S.C. §§ 905, 914. *Merrell Dow* explicitly restricted its holding to cases where no federal cause of action could be maintained for the injury. *See Merrell Dow* at _____, 106 S. Ct. at 3234, 92 L.Ed.2d at 660 ("The significance . . . that there is no federal private cause of action [under the FDCA] thus cannot be overstated").

question jurisdiction might still be available, although concededly a closer question.

Our determination that the LHWCA is so preemptive as to create federal question jurisdiction is no "expansion" of the *Avco* rule. The LHWCA, if anything, is broader, and more comprehensive than the LMRA. As we mentioned in our discussion of *Lueck*, § 301 of the LMRA merely places jurisdiction of labor disputes in the federal district courts. The LHWCA, on the other hand, contains not only the exclusive remedy section (§ 905(a)), but also sets out sections and chapters that comprehensively regulate employers and insurance carriers that provide LHWCA coverage, and utterly control the sum total of rights and obligations of insurers, employers and employees. We, by no means, then, are "diluting" the *Avco* rule; we are acknowledging an exception more powerful than the original. *See also, Taylor,* ____U.S. at ____ ____, 107 S. Ct. at 1548, 95 L.Ed.2d at 65 (Brennan, J., concurring).

Accordingly, we hold that federal question jurisdiction is present here, and declaratory relief may properly be considered.

Declaratory Judgment—Not a Forbidden Injunction

[13] We recognize that this declaration, to a certain extent, raises conceptually some questions regarding the *Younger v. Harris* line of cases.[16] We decline, however,

16. Beginning with *Younger v. Harris*, 401 U.S. 37, 91 S .Ct. 746, 27 L.Ed. 669 (1971), *Samuels v. Mackell*, 401 U.S. 66, 91 S. Ct. 764, 27 L.Ed.2d 688 (1971), *Perez v. Ledesma*, 401 U.S. 82, 91 S. Ct. 674, 27 L.Ed.2d 701 (1971), and continuing through the more recent cases of *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct.

to circumscribe the perimeter of this purely civil matter precisely along the fence erected against federal intervention in state criminal cases. Rather, we take our cue from Justice Brennan's opinion for a unanimous Court in *Steffel.* Although his comments were directed to the distinction between injunctive and declaratory relief in criminal matters, we find much of his opinion instructive on the propriety of the gentler relief of declaratory judgment in civil preemption matters. "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction. . . . [E]ven though a declaratory judgment has 'the force and effect of a final judgment', it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; non-compliance with it may be inappropriate, but it is not contempt. *Steffel,* 415 U.S. at 466, 471, 94 S. Ct. at 1219, 1221, 39 L.Ed.2d at 519, 521, *citing Perez v. Ledesma,* 401 U.S. at 124-126, 91 S. Ct. at 696-698, 27 L.Ed.2d at 728-729 (separate opinion of Brennan, J.). *Steffel* also makes clear that a showing of irreparable injury—a traditional prerequisite to injunctive relief, having no equivalent in the law of declaratory judgments,—is unnecessary in an action for declaratory judgment.[17] *Steffel,* 415 U.S. at 471-72, 94 S. Ct. at 1222, 39 L.Ed.2d at 521-22.

1209, 39 L.Ed.2d 505 (1974), *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L.Ed.2d 648 (1975), and *Huffman v. Pursue Ltd.*, 420 U.S. 592, 95 S. Ct. 1200, 43 L.Ed.2d 482 (1975), the Supreme Court has redefined and clarified the edges of a federal court's proper jurisdiction in rendering declaratory judgments on pending or threatened state actions in criminal (or closely related enforcement) cases.

17. Mr. Jackson makes much of the irreparable injury argument in his briefs. By considering declaratory relief only, however, we need not reach this issue.

Simply stated, a civil declaratory judgment is not a whole different kettle of fish from a criminal declaratory judgment; it is, rather, a kettle of fish stew seasoned with a set of private interests distinct from the concerns at issue in a state criminal proceeding.[18]

[14] Bearing in mind the instructive teaching of *Steffel,* we now approach the declaratory judgment. Clearly, there is an "actual controversy" between the parties: there is a pending trial. The parties have adverse legal interests and are positioned adversarily. We have already determined that an independent basis of jurisdiction, that is, federal question jurisdiction, exists. And finally, the issues in controversy between the parties remain very much alive.[19]

[15] While it is true that the pendancy of a state court proceeding is a proper basis for a federal court to decline to issue a declaratory judgment, *PPG Industries, Inc. v. Continental Oil Co.,* 478 F.2d 674, 677 (5th Cir. 1973), neither statutory nor case law mandates such refusal. *See Western Casualty & Surety Co. v. Teel,* 391 F.2d 764, 766 (10th Cir. 1968) ("Courts should not be deterred from giving full force and effect to the purpose of the De-

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18. One commentator posits this argument: "[T]he delicate balance of comity symbolized by the Tenth Amendment is much less endangered by federal jurisdiction over private suits than by jurisdiction over public suits. A rule that allows a federal District Court to take jurisdiction over a suit between private parties seeking a declaration that a state law is preempted—regardless of who raises the preemption issue—might even ease the tension between the state and federal judicial systems. Fewer conflicts would be resolved in proceedings in which a state was forced to justify its own laws to a federal district judge. These issues would be resolved instead in suits between private parties." *Note,* 62 Texas L. Rev. at 917.

19. *See generally* 6A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 57.11 (2d ed. 1986).

claratory Judgment Act."); *Travelers Indemnity Co. v. Winmill,* 294 F.Supp. 394, 397 (D. Minn. 1968) (spirit of the Declaratory Judgment Act counsels a practical approach in exercising discretion: "Problems should be appraised in the light of common sense, having regard to federal-state relations, comity between courts of concurrent jurisdiction, the potentials of the respective systems for expert and comprehensive solution, and factors such as cost and convenience to the public as well as to the parties."); *Wong v. Bacon,* 445 F.Supp. 1177, 1186-87 (N.D. Cal. 1977), *cited* approvingly in *Franchise Tax Board,* 463 U.S. at 22 n. 24, 103 S. Ct. at 2853, n. 24, 77 L.Ed.2d at 438 n. 24 (federal declaratory relief proper on a preemption claim, even though state court proceeding already pending).

In our earlier discussion under (iii) the relitigation exception to the Anti-Injunction Act, we held it unnecessary to reach the issue of the retroactive effect of *Parsons Steel* on the state court's rejection of TEIA's plea in bar.[20]

Here, however, we must address directly the implications of the Full Faith and Credit Act, 28 U.S.C. § 1738, from the standpoint of *Parsons Steel.* In Jackson's case, the state court held a special hearing on TEIA's plea in bar. The parties briefed the issue, and the court heard oral argument. The state court then rejected the claim, and set the case for trial.

[16] *Parsons Steel* speaks in terms of "issues" being finally decided. 474 U.S. at ____-____, 106 S. Ct. at 771-73, 88 L.Ed.2d at 883-84. Although this implies that a state court need not have rendered a truly final judgment

20. See discussion *supra* at n. 9.

on the case as a whole in order for res judicata and full faith and credit to come into play, it certainly means that the judicial order—opinion or otherwise—at issue must be one which the state court regards as final and beyond recall by the court issuing it. *See* Restatement (Second) of Judgments § 13 comment g (1982).

[17] Thus, if the state court's ruling was a "final" one, we ourselves are bound by that determination. Unlike our earlier discussion, in which we declined to find *Parsons Steel* sufficient to affirmatively support an injunction on issue relitigation, here it assumes negative significance. A federal declaratory judgment, issued subsequent to the state's ruling, would violate the Full Faith and Credit Act as construed in *Parsons Steel.* "[A] federal court must give the same preclusive effect to a state court judgment as another court of that state would give." *Parsons Steel,* 474 U.S. at ____, 106 S. Ct. at 771, 88 L.Ed.2d at 883, *citing Migra v. Warren City Bd. of Educ.,* 465 U.S. 75, 104 S. Ct. 892, 79 L.Ed.2d 56 (1984).

We thus review Texas state law to determine first, how "final" its courts would consider the state judge's ruling, and second, to what preclusive effect it is entitled.

[18] A recent Texas Supreme Court case ends our search. In *Van Dyke v. Boswell, O'Toole, Davis & Pickering,* 697 S.W.2d 381 (Tex. 1985), the supreme court adopted the Restatement (Second) of Judgments (1982) to determine issues like ours. The supreme court focused on "whether the conclusion in question was procedurally definite . . . and was subject to appeal or was in fact appealed." 697 S.W.2d at 385. Obviously, "subject to ap-

peal" is in terms of whether the order under scrutiny was itself then and there—with no necessity for further trial or judgment on the merits—could be appealed. The state court's ruling in Jackson's case was an interlocutory order. "It is Texas law, long established, that only those interlocutory decrees that are specifically made so by state are appealable." *General Box Co. v. Southwest Subsidiary Co.*, 598 S.W.2d 662, 663 (Tex. Civ. App. 1980). *See* also *Hunt Oil Co. v. Moore*, 639 S.W.2d 459 (Tex. 1982). Denial of a plea in bar is not an appealable interlocutory judgment under Texas law. Therefore, we hold that, since another Texas court would not consider this order "finally decided", neither should we accord it preclusive effect under full faith and credit. Our inquiry under *Parsons Steel* is satisfied.

Tail End of the Tale

We do not direct state courts. We do not today presume to decide cases or issues for them. They are as competent as we. Our determination today is valid for res judicata purposes as between these parties and as stare decisis in the Federal Courts of the Fifth Circuit. Although our judgment (and that of the District Court) has no coercive effect, we have no doubt that the Texas courts will, as always, accord full weight to the determination of a federal court having jurisdiction over the parties, speaking in terms of the application of a federal statute.

AFFIRMED IN PART, VACATED IN PART.

EDITH H. JONES, Circuit Judge, dissenting:

In their zeal to hold that the Longshoremen and Harbor Workers Compensation Act (LHWCA) is the exclusive remedy for Jackson, the majority have seriously erred in several facets of their analysis. Most critically, they conclude that we have jurisdiction over this action despite the obvious applicability of the well-pleaded complaint rule. The only basis of our jurisdiction is TEIA's federal defense, alleging preemption of state remedies by the LHWCA, to Jackson's claim for state law relief. A prior Fifth Circuit panel has disclaimed jurisdiction in a closely analogous case involving LHWCA, but the majority do not acknowledge its controlling effect.

The majority's rush to protect the supremacy of the federal compensation scheme has also led to an ungainly spectacle: a federal court's umpiring an ongoing lawsuit in state court. While the Supreme Court has not extended *Younger* abstention principles to all pending state court civil litigation, the majority have misread the analytical framework of the Court's most recent pronouncement on that issue.

I.

It is a rule almost too well settled to require citation that no federal jurisdiction exists in a declaratory judgment action if a federal question would arise only as a defense to a state cause of action. As stated by the Supreme court in *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 248, 73 S. Ct. 236, 242, 97 L.Ed. 291 (1952):

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an

> impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court.

"The best-settled application of the well-pleaded complaint rule to actions for a declaratory judgment is that federal question jurisdiction exists of a declaratory action if the plaintiff could have sued in federal court for coercive relief." 13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3566, at 99 (1984). This principle was recently reaffirmed in *Franchise Tax Board of California v. Construction Laborers Vacation Trust,* 463 U.S. 1, 103 S. Ct. 2841, 77 L.Ed.2d 420 (1983). There, the Court held that federal jurisdiction may not be premised "on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." 463 U.S. at 14, 103 S. Ct. at 2848. See also *Caterpillar, Inc. v. Williams,* ____U.S.____, 107 S. Ct. 2425, 2429, 95 L.Ed.2d ____ (1987) (holding that it is "settled law" that a federal defense to a state law cause of action, including the defense of preemption, is insufficient to establish federal question jurisdiction under the well-pleaded complaint rule).

The majority acknowledge this rule, as well as its applicability here. Jackson's state law complaint contains no operative ingredient of federal law. The LHWCA becomes pertinent only as the basis for TEIA's preemption defense. The majority neglect, however, to address this court's controlling prior decision that the LHWCA does not overcome the well-pleaded complaint rule in a declaratory judgment context.

In *Lowe v. Ingalls Shipbuilding,* 723 F.2d 1173 (5th Cir. 1984), a declaratory judgment action was instituted by several individuals against Litton, the parent of their shipbuilding employer Ingalls, and Owens-Corning Corporation. The complaint alleged that each of the plaintiffs had previously filed a suit against Owens-Corning for personal injury resulting from exposure to asbestos, which Owens-Corning agreed to settle conditioned on approval by Litton. Litton declined to give its approval and asserted, as plaintiffs' employer, an independent right of indemnification against Owens-Corning in addition to its LHWCA subrogation rights. Thus, plaintiffs sought a declaration that Litton had no right of indemnification against Owens-Corning and that the right of subrogation under the LHWCA was Litton's exclusive remedy.

Applying the well-pleaded complaint rule, this court concluded that jurisdiction was lacking because "plaintiffs do not assert a cause of action or claim under the LHWCA against Litton, but rather seek declaratory judgment concerning the effect of the LHWCA on claims Litton might otherwise have against Owens-Corning." 723 F.2d at 1179. The court reasoned that it was immaterial "that plaintiffs and Owens-Corning contend that the LHWCA . . . bars such an action, *as this is the sort of defensive issue which cannot form the basis of section 1331 jurisdiction." Id.* at 1183 (emphasis added). *Lowe* inescapably requires us to deny jurisdiction over TEIA's declaratory judgment request.

Not to be deterred, the majority attempt to fit TEIA's claim into the exception to the well-pleaded complaint rule recognized in *Avco v. Aero Lodge No. 735,* 390 U.S. 557, 88 S. Ct. 1235, 20 L.Ed.2d 126 (1968) which held that the breadth of section 301 of the LMRA dis-

placed state causes of action relating to mangement/ labor relations. Declaring the LHWCA as comprehensive in scope as the LMRA, the majority would effectively transform what would normally be state law claims into claims uniquely federal in character. This argument overlooks that *Avco* represents a virtually unique exception to the well-pleaded complaint rule. The Supreme Court recently reaffirmed that unless Congress unmistakably manifests an intent to make a cause of action removable to federal court, a defense of federal preemption is insufficient to create federal subject matter jurisdiction. *Metropolitan Life Insurance Co. v. Taylor,* ____U.S.____, 107 S. Ct. 1542, 95 L.Ed.2d 55 (1987).[1] *Avco* itself

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1. *Taylor* admittedly extended the *Avco* exception to hold that state common law claims which are preempted by ERISA were also displaced by ERISA's civil enforcement provision, § 502(a)(1)(B), thus creating federal question jurisdiction on removal under 28 U.S.C. § 1441(b) of what would otherwise be uniquely state law causes of action. While, on its face, ERISA's civil enforcement provision appears exceptionally broad, the Court was reluctant to extend *Avco* to the civil enforcement framework of ERISA:

> Even with a provision such as § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA . . . we would be reluctant to find that extraordinary preemptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well pleaded complaint rule.

107 S. Ct. at 1547.

The Court's decision was founded on the virtual identity between the jurisdictional schemes of ERISA, § 502(f), 29 U.S.C. § 1132(f) and the LMRA § 301, 29 U.S.C. § 185(a), and congressional history explicitly linking those two provisions:

> The presumption that similar language in two labor statutes has a similar meaning is fully confirmed by the legislative history of ERISA's civil enforcement provisions. The Conference Report on ERISA describing the civil enforcement provisions of § 502(a) says:
>
> "[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the Title I provisions, they may be

is not an allencompassing labor-law exception to the well-pleaded complaint rule. The Supreme Court, reiterating its *Metropolitan Life* pronouncement, stated that "the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is master of the complaint, that a federal question must appear on the face of the complaint [i.e. not as a defense], and that the plaintiff may . . . choose to have the cause heard in state court." *Caterpillar, Inc. v. Williams,* 107 S. Ct. at 2433. Thus, the Court concluded, a state court may interpret § 301 and a federal collective bargaining agreement whose terms are raised in defense to plaintiffs' state law action for an alleged employment contract breach. Likewise, we are bound by the formidable and "settled" well-pleaded complaint doctrine to reject TEIA's search for shelter in

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brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*" H.R. Conf. Rep. No. 93-1280, p. 327 (1974) (emphasis added).

No more specific reference to the *Avco* rule can be expected. . . . *Id.* Nevertheless, the Court cautioned, "even an 'obvious' preemption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court." *Id.* at 1548.

The LHWCA contains no civil enforcement provision like the Siamese twin provisions found decisive in *Taylor* between ERISA and § 301 of the LMRA. The decisive factor therefore is whether the LHWCA is "so powerful as to displace entirely any state cause of action. . . ." *Franchise Tax Board,* 463 U.S. at 23, 103 S. Ct. at 2853. Congress has not indicated, as it did with ERISA, that the LHWCA reaches this far. Absent a direct expression of legislative intent to create federal jurisdiction for all causes of action related to LHWCA, the well-pleaded complaint rule may not be overcome.

a federal forum. TEIA may obtain resolution of its federal law issues in state court, with review by the Supreme Court if necessary.

II.

Having discussed the dispositive question, I must nevertheless take issue with two additional portions of the majority opinion. First, the discussion of abstention by the majority appears to be a "strawman" erected to defer attention from the more significant question whether granting declaratory relief would in this case violate, in letter or in spirit, the Anti-Injunction Act, 28 U.S.C. § 2283. Second, to the extent *Younger*[2] abstention principles are applicable to non-§ 1983 cases, I disagree with the majority's cavalier treatment of these principles in the civil context.

A.

Although the majority conclude that 28 U.S.C. § 2283 prohibits issuance of injunctive relief, they determine that declaratory relief is not prohibited because the effects of federal intervention are supposedly less intrusive in the declaratory judgment context. Relying on *Steffel v. Thompson,* 415 U.S. 452, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974), the majority effectively finesse the limitations of the Anti-Injunction Act and approve declaratory relief whose effect, as res judicata between these parties, will probably terminate the pending stage litigation as effectively as would an injunction.

Steffel, to borrow a phrase, is a whole different kettle of fish from this case. The Supreme Court's dicta there

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2. *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746 L.Ed.2d 669 (1971).

suggest that "different considerations" affect the decision whether to grant declaratory relief vis-a-vis injunctive relief in that a declaratory judgment is less intrusive to a state's interest in preserving the integrity of its judiciary. What the majority overlook, however, is the critical distinction in *Steffel*: principles of comity and federalism were not implicated in that case *because there was no pending state proceeding.*

The Supreme Court has, however, underscored the proposition that principles of comity and federalism apply with equal weight to federal declaratory judgment actions instituted during the pendency of state criminal proceedings. In *Samuels v. Mackell,* 401 U.S. 66, 72, 91 S. Ct. 764, 767, 27 L.Ed.2d 688 (1971), the Court reasoned that:

> In cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations deeply rooted and long-settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid.

The Court expressed two fundamental concerns over issuing declaratory relief during the pendency of state proceedings. First, the Court questioned whether granting declaratory relief would effectively bootstrap the proscriptions of the Anti-Injunction Act if it later served as the basis for an injunction against those proceedings to "protect or effectuate" the declaratory judgment. 28 U.S.C. § 2283. Second, the Court noted that "even if

the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would." 401 U.S. at 72, 91 S. Ct. at 768. While *Samuels* was decided in the § 1983 context, its lessons are instructive. *Younger, Samuels,* and their abstention progeny developed as an equitable means by which federal courts could abstain from hearing cases which fall within an exception to the Anti-Injunction Act recognized in *Mitchum v. Foster,* 407 U.S. 225, 92 S. Ct. 2151, 32 L.Ed.2d 705 (1972) for § 1983 cases. By analogy, if, as here, *no* exception to the Anti-Injunction Statute exists, it would seem inappropriate for the federal court to intrude in ongoing state proceedings solely to issue a Delphic pronouncement to the parties and state court in the form of a declaratory judgment on applicable federal law. Cf. *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976).

Professor Wright agrees that generally "if a declaratory judgment would have essentially the same effect as an injunction, it should be refused if the injunction would be barred by § 2283." 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4222, at 316 (1978). *See also Chandler v. O'Bryan,* 445 F.2d 1045, 1058 (10th Cir. 1971); *McLucas v. Palmer,* 427 F.2d 239, 242 (2d Cir. 1970); *Glasgow, Inc. v. Noetzel,* 556 F.Supp. 595, 598 (S.D.W.V. 1983). Because we all agree that 28 U.S.C. § 2283 prohibits an injunction in this case, the same concerns therefore should militate against the propriety of issuing a declaratory judgment. By ignoring this issue, the majority have completely

undermined the dominant principles of comity and federalism reflected in the Anti-Injunction Act.

B.

I also disagree the majority's declining "to circumscribe the parameter of this purely civil matter precisely along the fence erected against federal intervention in state criminal cases." *Ante* at 5109. In light of *Pennzoil Co. v. Texaco Inc.*, ____U.S.____, 107 S. Ct. 1519, 95 L.Ed.2d 1 (1987), the majority's conclusion, while apparently facially correct, is derived from inappropriate analysis. The Supreme Court recently held in *Pennzoil* that *Younger v. Harris* bars an injunction against state proceedings "not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." ____ U.S. at ____, 107 S. Ct. at 1526 (citation omitted). The Supreme Court rebuffed Texaco's quest for an injunction against the application of Texas post-judgment bond requirements on the grounds that (1) the interference with state collection procedures questioned "the very process by which those judgments were obtained" and (2) Texaco had an adequate, albeit unexplored, remedy should it challenge the statute in the state courts. The court concluded that: "proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand." ____ U.S. at ____, 107 S. Ct. at 1527 (footnote omitted).

The breadth of the Court's holding, however, must be gauged by two footnotes. In one, the majority observed

that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." ____ U.S. at ____, n. 9, 107 S. Ct. at 1526 n. 9. Shortly thereafter, they caution that "[o]ur opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court. Rather, as in *Juidice,* we rely on the State's interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory.'" ____ U.S. at ____ n. 12, 107 S. Ct. at 1527 n. 12 (quoting *Juidice v. Vail,* 430 U.S. 327, 336 n. 12, 97 S. Ct. 1211, 1217 n. 12, 51 L.Ed.2d 376). Two pertinent questions follow from the Court's comments: whether a declaratory judgment could ever lead to the interference sought to be avoided in *Pennzoil;* and whether *this* declaratory judgment action should be so proscribed. I would disagree with the majority and answer the first question affirmatively, based on *Samuels* and the above-cited portions of the *Pennzoil* opinion. Because the second issue is not briefed or argued, I would defer its resolution. The majority too hastily dismiss the rationale for abstention in the post-*Pennzoil* era.

For the foregoing reasons, I respectfully dissent.

C. Opinion of the U.S. District Court

TEXAS EMPLOYERS INSURANCE ASSOCIATION

v.

Leroy JACKSON.

Civ. A. No. B-85-776-CA.

United States District Court,
E.D. Texas,
Beaumont Division.

Oct. 1, 1985.

Employer's carrier sought declaratory judgment and permanent injunction against longshoreman from continuing to assert and prosecute suit in state court. The District Court, Cobb, J., held that: (1) Longshoremen's and Harbor Workers' Compensation Act preempts state law regarding actions for bad-faith handling of claims under the Act; thus, employee's recovery against carrier was limited to that provided by the Act itself, and (2) carrier was entitled to injunction.

Injunction granted.

Royce Till/Reagan Simpson, Fulbright & Jaworski, Houston, Tex., for plaintiff.

Richard Schechter, Schechter, Eisenman & Solar, Houston, Tex., for defendant.

MEMORANDUM OPINION

COBB, District Judge.

In this action, the plaintiff, Texas Employer Insurance Association (TEIA) seeks a declaratory judgment and a

permanent injunction against the defendant, Leroy Jackson (Jackson) from continuing to assert and prosecute his suit against TEIA in the District Court of Jefferson County. For the reasons explained herein, plaintiff's Motion for Injunctive Relief is GRANTED.

The plaintiff was the insurance carrier for Gulfport Shipbuilding Company, and provided coverage against liability arising from claims filed under the Longshore and Harbor Workers' Compensation Act (referred to as the "LHWCA" or the "Act."), 33 U.S.C. 901 *et seq.* At all times material to this action, Gulfport Shipbuilding Company was Jackson's employer subject to the terms of the LHWCA, but it is not a party in the instant litigation.

On July 13, 1978, Leroy Jackson, the defendant, was injured in the course and scope of his employment with Gulfport when he fell while working on a barge located in navigable waters. Jackson properly notified his employer of his injury and the plaintiff initiated payments of temporary total disability benefits. Jackson filed a formal claim for LHWCA compensation in July 1983, at which time the plaintiff controverted the claim. The plaintiff stopped paying compensation benefits in April 1983. After an informal conference with a representative of the Department of Labor, TEIA resumed compensation payments in July 1983. The plaintiff again terminated compensation payments in September 1983 after the defendant was examined by a physician of his own choice.

On May 3, 1984, the claim came on for formal hearing before the Honorable Ellin M. O'Shea, Administrative Law Judge. On September 14, 1984, Judge O'Shea issued

a decision and order awarding the defendant compensation for temporary total disability, total permanent disability, attorney's fees and interest on all past unpaid amounts. The decision was not appealed and therefore became final.

The defendant filed an action in the District Court of Jefferson County, Texas, on June 7, 1984, asserting seven causes of action arising from the plaintiff's alleged bad faith handling and termination of the LHWCA compensation payments. The causes of action alleged by Jackson are: (1) violation of the Texas Insurance Code; (2) violation of the Texas Business and Commercial Code; (3) bad faith claims practices under Texas state law; (4) fraud under Texas state law; (5) intentional infliction of emotional distress; (6) negligent infliction of emotional distress; and (7) wilful and wanton disregard for the health, safety and welfare of others.

Plaintiff has brought this action pursuant to the Declaratory Judgment Act,[1] seeking a determination that the manner in which a LHWCA claim is handled is exclusively controlled by the LHWCA, that the exclusive jurisdiction of all such claims is vested in the United States Department of Labor and in the United States federal court system, and that the award issued by Judge O'Shea is res judicata as to such claims. In addition to seeking a declaratory judgment to such effect, plaintiff further prays for an injunction to enjoin the defendant Jackson from pursuing the state court action.

The defendant contends that the LHWCA has not pre-empted Texas law in this area, that the doctrine of res judicata is inapplicable, that an injunction would

1. 28 U.S.C. 2201, 2202.

not comply with the Anti-Injunction Act,[2] and that this court should abstain from ruling on plaintiff's motions.

This court, after hearing the parties' arguments and carefully considering the law and evidence of this case, has concluded that plaintiff's motion for injunctive relief should be granted and that the defendant should be permanently enjoined from proceeding with his action in state court.

I. PRE-EMPTION OF STATE LAW

[1-4] This court adopts the position that the LHWCA has pre-empted state law regarding actions for bad faith handling of LHWCA claims. It is well established that Congress may pre-empt an area of law under the Supremacy Clause of the U.S. Constitution. Pre-emption may be express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L.Ed.2d 64 (1977). Absent explicit pre-emptive language, Congress' intent to supercede state law may be inferred when the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when state law "stands as an obstacle to the accomplishment and execution of

2. 28 U.S.C. 2283.

the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed. 581 (1941). This court concludes that the Act would pre-empt Texas law in this case on any of these three bases.

[5] Section 5[3] of the LHWCA provides that the exclusive liability of an employer covered by the Act is the payment of the benefits, costs and penalties provided for therein. Section 35[4] of the Act places an insurance carrier in the same position as the employer. While there is no provision which states, "This Act pre-empts all state law in this area," these provisions are nevertheless adequate to find that Congress expressly pre-empted the field by providing the exclusive remedy against employers and carriers as to actions arising under the LHWCA. The language providing that the Act is the exclusive remedy against an employer or carrier is a sufficiently explicit basis to pre-empt conflicting state law.

[6] Even if Congress had not explicitly expressed its intent to pre-empt the area of compensation for these employees, the Congressional scheme of federal regulation is so pervasive as to warrant the inference that Congress intended to supercede state law in this area. This intent is discernible from the comprehensive federal nature of the provisions of the Act. Section 39[5] of the LHWCA places the primary duty of administering the Act on the Secretary of Labor. Appeals of compensation orders are handled by the Benefits Review Board of the Department of Labor and then by the Court of Appeals

3. 33 U.S.C. § 905.

4. 33 U.S.C. § 935.

5. 33 U.S.C. § 939.

of the United States.[6] The United States District Courts are the exclusive agent to enforce final orders.[7] There are no provisions which allow state intervention at any stage of the process. It is clear from the terms of the Act that the sole cause of action in these cases is federal in nature and allows for no state supervision.

It is also clear that regulation by the State of Texas which the defendant seeks would be an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. One of the apparent objectives of Congress in enacting the LHWCA was to provide uniform protection to certain classes of employees. This purpose would be hampered if every state were able to freely amend the Act and require varying standards of conduct by the parties.

Another apparent objective of Congress was to provide an expedited procedure to enabled the covered employees to recover adequate compensation with minimal legal entanglements. The employee has an easier burden of proof to establish liability, and the employer and its carrier are protected from actions brought from outside the scope of the LHWCA. The protection of each party would be lost if they had to contemplate posturing for advantageous positions in later law suits which might arise from the handling of such claims.

[7] It is apparent that under any of the three tests for pre-emption set out above, Congress intended that the LHWCA supercede any conflicting state law regarding the handling of claims and payments under the Act. The LHWCA does provide remedies for late payment

6. 33 U.S.C. § 921.

7. 33 U.S.C. §§ 918 and 921(d).

and non-payment of installments,[8] but does not distinguish between good faith and bad faith non-payment. The only allowable justification for non-payment of an installment is that there is no liability. Judge O'Shea was apparently aware of the remedies for non-payment in that she applied the penalties provided in the Act, in essence, ruling that the plaintiff wrongfully withheld the payment of the compensation. A carrier's good faith belief that it is not liable under the LHWCA is not sufficient grounds to protect it from the penalties provided for if liability is later found. The Act also provides no requirement that good faith be exercised controverting a claim or delaying payment thereon. Good faith simply does not play a part in the LHWCA scheme as far as the controverting of claims.[9] In pre-empting state law in this area, Congress has set aside state causes of action for bad faith claims handling.

This court's conclusion is reinforced by the Supreme Court's ruling in *Allis-Chalmers Corp. v. Lueck*, ____ U.S.____, 105 S. Ct. 1904, 85 L.Ed.2d 206 (1985). In *Lueck*, the Supreme Court was extremely hesitant to allow a state court to decide the scope of federally created rights and obligations. The Court held that a state law requirement of good faith in payments of compensation may not be used to expand the applicable labor relations law governing contracts and that the state law

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8. 33 U.S.C. §§ 914 and 938(b).

9. It is worth noting that in the 1984 amendments to the LHWCA, Pub. L. 98-426, 98 Stat. 1639, Congress added a bad faith clause to the act, § 31[c], but left the penalty provisions for late payment and non-payment of installments as they were. While the amendments are not applicable in the present case, they are indicative that Congress was aware of bad faith actions by the parties and intended to control them through the LHWCA. *See also* § 38(b).

was preempted by federal law. The basis of this opinion was that the tort was rooted in contract law. In the present case, the violations alleged are rooted in federal compensation law. But for the federal compensation law, there could be no mishandling of the claim since there could be no claim.

That the LHWCA pre-empts state law is further supported by the Supreme Court's ruling in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed. 2d 490 (1983), wherein the Court held that New York's Human Rights Law was pre-empted to the extent that it prohibited practices that were lawful under federal law. The only limitations the Court placed on pre-emption in that case were due to the fact that the federal statute in question was self-limiting and contemplated inclusion of state programs. In the present case, the federal statute is neither self-limiting or dependent upon state support in order to effectuate its goals.

An action in the state courts of Texas in this case would necessarily and improperly limit the scope of the LHWCA. The Act makes no reference to incorporating any Texas insurance standards. To require a standard of good faith would be to substitute a higher standard than that set out in the Act itself. As mentioned, the federal standard of conduct in an LHWCA claim does not include good faith but the Act does provide penalties for the wrongful withholding of compensation. A state court should not be allowed unilaterally to amend the Act in ways that Congress did not intend. This is so because the conduct complained of arises from the alleged mishandling of a federally created right, as opposed to a state statutory or common law right. There can be no escaping the conclusion that except for the

federally created rights and duties there could be no mishandling of compensation. Since the right to compensation comes from the LHWCA, the right to damages for mishandling the compensation also arises from the Act.

[8] The defendant asserts that under the McCarran Act,[10] the regulation of the insurance business is to be left to the states.[11] Further, the McCarran Act provides that no Act of Congress shall be construed to invalidate, impair or supercede any law enacted by any State for the purpose of regulating the business of insurance unless such Act specifically relates to the business of insurance.[12] This court holds that for the purposes of the McCarran Act, the LHWCA specifically relates to the business of insurance and may therefore supercede any Texas regulation of the insurance industry contrary to the terms of the act. The carrier is subject to the same duties and liabilities as the employer,[13] which amounts to detailed and pervasive regulation. Additionally, the carrier must meet further requirements in its policies and contracts.[14] One is forced to conclude that the LHWCA does govern the actions and responsibilities of insurance carriers to such a degree that it specifically relates to the business of insurance.

The defendant also asserts the proposition that *Allis-Chalmers Corp. v. Lueck, supra,* does not apply to the facts of this litigation. While that case is not in all ways

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10. 15 U.S.C. §§ 1011-1015.

11. 15 U.S.C. § 1012(a).

12. 15 U.S.C. § 1012(b).

13. 33 U.S.C. § 935.

14. 33 U.S.C. § 936.

directly in point, the facts in *Lueck* and this case are similar and the rationale in *Lueck* is enlightening. The question in both cases is whether state law may require *good faith handling* of compensation claims when the *right* to compensation is federally created. Having disposed of the issue as to whether the LHWCA regulates the business of insurance, the court turns to the contention that *Lueck* should not apply to a state imposed duty as opposed to a contractually imposed duty. While the Supreme Court expressly reserved judgment on that very issue, the argument for preemption appears even stronger than in *Lueck*. In that case, the state tort action involved interpretation of a private contract, the particulars of which were not prescribed by federal law. In the present action, the proposed tort claim would require the State of Texas to go to determine what "good faith" and "bad faith" mean in the context of an LHWCA claim. In essence, this means that Texas would determine what are the obligations of a carrier or employer under the Act. This could very well result in a misapplication of LHWCA standards, either by making additional requirements not found in the Act or by diluting the standards which the Act requires.

The defendant holds out the case *Martin v. Travelers Insurance Company*, 497 F.2d 329 (1st Cir. 1974), as support for his contention that he should be able to file a lawsuit in state court for the carrier's alleged bad faith conduct in administering LHWCA compensation payments. This court does not find *Martin* persuasive on several grounds. That case appears to be alone in its conclusion as to the pre-emptive effect of the LHWCA. Not only is there no authority in the text of the opinion which supports the conclusion, but the case appears not

to have been cited as authority by any other federal court. Perhaps more tellingly, it is noted that since *Martin* has been decided, the Supreme Court has issued *Lueck* and other cases which strongly indicate *Martin* may have been decided differently today.

Moreover, it is noted that the action in *Martin* was commenced in federal district court as opposed to state court. Further, the action appears to have been predicated on the LHWCA with only the remedy to come from state law. In the instant case the defendant wishes to proceed in state court with causes of action arising from state statutory or common law and with state remedies interspersed and intermingled with LHWCA causes of action. These differences in approach remove the present case from the *Martin* holding, however authoritative it might be.

Having weighed the arguments of counsel and considered the effects and implications of its ruling, this court is persuaded that Congress did indeed intend for the LHWCA to pre-empt any state causes of action arising from the handling of compensation payments under the Acts. Therefore, the recovery of the defendant against the carrier is limited to that provided for by the Act itself.

II. RES JUDICATA

[9] The defendant raises the issue as to whether the award given to the defendant by the ALJ is res judicata, preventing the claimant from pursuing an additional award for the alleged mishandling of compensation payments. An examination of the relevant law convinces this court the earlier award is res judicata as

to issues which were or could have been litigated at the formal LWHA hearing.

> Though proceedings under workmen's compensation statutes are generally informal, and procedural rules governing them should be liberal, a final award is generally 'res judicata' except as the statute otherwise provides.

Stansfield v. Lykes Bros. S.S. Co., 124 F.2d 999, 1004 (5th Cir. 1942). There is no evidence that the statute itself provides for less than full res judicata effect, so this general rule will be applied barring unusual circumstances.

Jackson asserts there should be no res judicata from the previous ruling because he has not had the opportunity to litigate the disputed issues of fact, in effect contending that this is an unusual circumstance which removes the case from the statement of the law set out above. However, Jackson had the opportunity and did fully litigate the disputed issues of fact. After hearing the argument of counsel, the ALJ awarded the defendant compensation, attorney's fees and interest. These benefits and penalties are only available if the plaintiff wrongfully withheld payment of the benefits. 33 U.S.C. § 938(a) and (b). Having ruled that the plaintiff was wrong in withholding benefits, res judicata precludes a trial based on the same issue. The fact that the defendant did not and possibly could not assert the various theories and request the remedies which he now propounds in state court does not alter the fact that he has already fully litigated the issue of wrongful withholding of compensation payments, nor

that he received a judgment for damages based on that very issue.

[10] The court recognizes that the doctrine of res judicata does not apply to issues that were decided but were not properly within the jurisdiction of the administrative agency. *United States v. Radio Corporation of America,* 358 U.S. 334, 79 S. Ct. 457, 3 L.Ed. 2d 354 (1959). However, under § 38 of the LHWCA, the matter of the wrongfulness of the plaintiff's withholding of benefits was properly before the ALJ, and was within her jurisdiction.

The defendant contends that *Martin v. Travelers Insurance Co., supra,* implicitly holds that a cause of action for mishandling compensation payments is not available under the LHWCA. This court reads that case to stand for the oppositie conclusion. In *Martin* the cause of action arose under the Act,[15] and only an independent remedy was allowed. Since this matter was properly before the ALJ and was fully litigated and properly decided, the award precludes relitigation of that same issue in state court, even if the theories of recovery asserted and remedies sought are different.

III. THE INJUNCTION

[11-14] The Anti-Injunction statute states that a court of the United States "may not grant an injunction to

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15. The very first sentence of *Martin* sets forth this premise in as many words. Additionally, that court stated "whether the insurer's actions, if proven, give rise to a separate cause of action under state law, or upon some other theory, against the insurer is not a question we presently can answer." This statement does little to support defendant's contention that the cause of action in tort arose under state law.

stay proceedings in a State court except when expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[16] A federal court may not enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 294, 90 S. Ct. 1739, 1746, 26 L.Ed.2d 234 (1970). However, a federal court may enjoin state proceedings which are precluded under the doctrine of res judicata. *Donelon v. New Orleans Terminal Company,* 474 F.2d 1108, 1114 (5th Cir. 1973). The relitigation exception also permits a federal court to enjoin relitigation in a state court of issues already decided in federal litigation. *Mitchum v. Foster,* 407 U.S. 225, 235, 92 S. Ct. 2151, 2158, 32 L.Ed.2d 705 (1972). For the purposes of this action, a determination by the ALJ is a final decision resulting from federal litigation.

Not only does this case fall under the "necessary to protect or effectuate judgment" clause as discussed above, but it also is within the "expressly authorized" exception to the anti-injunction statute. In *Mitchum v. Foster, supra,* the Supreme Court ruled that in order to qualify for this exception, a federal law need neither contain an express reference to the statute nor expressly authorize an injunction of the state proceeding. The law, however, must create "a specific and uniquely federal right or remedy enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state proceeding.[17]

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16. 28 U.S.C. § 2283.

17. *Mitchum v. Foster, supra,* pp. 237-38, 92 S. Ct. pp. 2159-60.

§ 21(d) of the LHWCA shows that the federal rights and remedies contained in the Act are enforceable in a federal court of equity. The issue then becomes whether the federal rights and remedies can be given their intended scope only if a federal court has the power to stay state proceedings. This court has already discussed how Congress intended to mandate expedited recovery with minimal legal entanglements when it enacted the LHWCA, and how the Act was to provide a uniform compensation scheme for protected employees. Both these purposes could be frustrated if the federal courts could not enjoin state proceedings. But the most convincing support for allowing a federal court to stay such proceedings is found in § 5 of the Act. The LHWCA could hardly be considered the exclusive remedy for covered employees if the employee is free to pursue other remdies in state court for denial of the same federally granted rights. It is apparent that the LHWCA can be given its intended scope only if a federal court has the power under the Act to enjoin state proceedings.

[15] The defendant finally urges the court to exercise its discretion and abstain from interfering with the state proceedings. Though federal courts are reluctant to use their injunctive power to stay state proceedings, they certainly have the power to do so. In *Wall v. American Optometric Association, Inc.*, 379 F.Supp. 175, 183-83 (N.D. Ga. 1974), aff'd 419 U.S. 888, 95 S. Ct. 166, 42 L.Ed.2d 134 (1974), it was held that "abstention . . . is left in the discretion of the district court . . . and should be exercised only in those rare cases in which the district court believes it would further the goals of federalism without interfering with Congress' intention to provide a federal forum for the vindication of federal rights." Under

this formulation, abstention is not proper in this case because by abstaining this court would be ceding exclusive federal jurisdiction to a state court. This would in no way further federalism in that the deliberate delineation of federal and state powers would be breached with no commensurate benefits. To abstain would certainly interfere with Congress' intent to have a federal forum decide controversies concerning federal rights.

Accordingly, this court holds that Congress has preempted the entire field of compensation awarded under the LHWCA, that the award granted by the ALJ is res judicata as to the issue of wrongful handling of compensation benefits, that the defendant is permanently enjoined from proceeding on these matters in state court, and that federal abstention is not proper in this case.

IT IS SO ORDERED.

Part 3: Judgments and Order Below

A. Judgment of the Fifth Circuit En Banc

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 85-2583 and 85-2690

D.C. Docket No. B 85-776-CA

TEXAS EMPLOYER'S INSURANCE ASSOCIATION, Plaintiff-Appellee,

v.

LEROY JACKSON, Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

(Filed December 13, 1988)

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, and SMITH, Circuit Judges.

JUDGMENT ON SUGGESTION FOR REHEARING EN BANC

This cause came on to be heard on the appellant's suggestion for rehearing en banc.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is ordered dismissed.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

December 13, 1988

CLARK, Chief Judge, concurring specially in the opinions of Judges Garwood and Rubin.

RUBIN, Circuit Judge, with whom JOHNSON, Circuit Judge, joins concurring (Judges BROWN and WILLIAMS join in part II.

BROWN, Circuit Judge, with whom WILLIAMS, Circuit Judge, joins dissenting in part and concurring in part.

ISSUED AS MANDATE:

B. Judgment of the Fifth Circuit Panel

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2583 and 85-2690

D.C. Docket No. B-85-776-CA

TEXAS EMPLOYER'S INSURANCE ASSOCIATION, Plaintiff-Appellee,

v.

LEROY JACKSON, Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Texas

(Filed July 15, 1987)

Before BROWN, REAVLEY, and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bears its own costs on appeal.

July 15, 1987

JONES, Circuit Judge, dissenting.

ISSUED AS MANDATE:

C. Order of the U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. A. NO. B-85-776-CA

TEXAS EMPLOYERS' INSURANCE ASSOCIATION, Plaintiff

v.

LEROY JACKSON, Defendant

(Filed August 21, 1985)

ORDER

The complaint of the Plaintiff for a declaratory judgment and for an injunction having come on regularly to be heard, and having considered the oral arguments and the briefs of the parties, the Court finds as follows:

This Court has jurisdiction over the parties and over the subject matter of Plaintiff's complaint.

The action of the Defendant presently pending in the State of Texas District Court of Jefferson County, which asserts various theories of recovery based upon the manner in which the Plaintiff handled Defendant's claim for compensation and other benefits under the Longshore and Harbor Workers' Compensation Act ("The Longshore Act") 33 U.S.C. § 901, et seq., is pre-empted by the Longshore Act. Any remedy Defendant may have for the alleged conduct of the Plaintiff in handling that claim is restricted to the recoveries provided for in the Longshore Act. Defendant has made a claim under the Longshore Act against Plaintiff and against Plaintiff's assured,

Gulfport Shipbuilding, and has been awarded relief in an order dated September 14, 1984, issued by Administrative Law Judge Ellin M. O'Shea, which order has become final. That order is res judicata with respect to the claims being made by Defendant in the state court action mentioned above. Having so found, it is hereby

ORDERED, CONSIDERED, and ADJUDGED that Defendant is enjoined from further prosecuting any claim against Plaintiff based upon the manner in which Plaintiff handled Defendant's claim under the Longshore Act; that Plaintiff must post a bond in the amount of $50,000.00 for payment of any damages caused by the granting of the injunction, should the injunction later be held void; and that Plaintiff shall bear its own costs and Defendant shall bear his own costs.

So ordered this 21st day of August, 1985.

/s/ HOWELL COBB
Hon. Howell Cobb
United States District Judge
Eastern District of Texas
Beaumont Division

APPROVED FOR ENTRY:

FULBRIGHT & JAWORSKI

By: /s/ STEPHEN P. PATE
Stephen P. Pate
Attorney for TEIA
800 MBank Building
Houston, Texas 77002
(713) 651-5151

APPROVED AS TO FORM ONLY:

SCHECHTER, EISENMAN & SOLAR

By: /s/ RICHARD SCHECHTER
Richard Schechter
Attorney for Leroy Jackson
525 Webster
Houston, Texas 77002
(713) 757-7811

Part 4: Chronology of Events

CHRONOLOGY OF EVENTS

7-12-78	Date of Mr. Jackson's injury.
7-06-82	Formal claim filed.
7-23-82	First controversion filed.
4-04-83	First suspension of compensation cited by Mr. Jackson as bad-faith conduct. Last date of previous payment was 3-24-83.
4-13-83	Date of letter from Dr. Martin Haig alleging assurance from TEIA that compensation would not be suspended.
7-06-83	First informal conference before James T. Smith, Deputy Commissioner. TEIA agrees to resume payment of benefits retroactively from last payment made.
8-15-83	Re-examination of Mr. Jackson by Dr. James Cloud.
9-14-83	Second controversion filed.
9-15-83	Second suspension of compensation cited as bad-faith conduct. Date of last payment was through 9-09-83.
9-28-83	Second informal conference before Ellen Guy, Claims Examiner.
9-29-83	Third controversion filed.
5-03-84	Formal hearing conducted.
6-05-84	Bad-faith insurance practices suit filed in state court.

6-06-84	Date of demand letter from Mr. Jackson's counsel relating to claim of bad-faith insurance practices.
9-14-84	Final Decision and Order of Administrative Law Judge, Ellin M. O'Shea, finding Mr. Jackson totally and permanently disabled.
1-11-85	Plea in Bar denied by state court.
6-05-85	TEIA files suit in federal court for declaratory and injunctive relief.

Part 5: Controversions Filed by TEIA

OMB Approval No. 044-R0893

NOTICE OF CONTROVERSION OF RIGHT TO COMPENSATION

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Longshore and Harbor Workers' Compensation

This report is authorized by law and regulation (33 USC 914(d), (e); 20 CFR 702.233). Failure to report when controverting right to compensation can result in liability for 10 per cent additional compensation.

INSTRUCTIONS: This form may be used by the employer/carrier to controvert the right to compensation. 33 USC § 914(a) requires the employer to pay compensation promptly and without an award unless the right to such compensation is controverted by the filing of this form. Failure to pay each installment of compensation, or controvert the right to such compensation, within fourteen days after it becomes due may result in liability for additional compensation equal to ten percent of each installment not paid when due. 33 USC § 914(d), (e). If the right to compensation is controverted, this form should be submitted in triplicate to the Deputy Commissioner, and the reasons for such controversion should be fully stated in item 12. All prior issues of Forms LS-207 are obsolete and should not be used.

1. OWCP File No.:

   8-42728

2. Employer File No.:

   436-54-6411

3. Carrier File No.:

   36-78-50255

4. Claimant's Name and Address:

   Leroy Jackson
   1128 E. 15th Street
   Port Arthur, Texas 77640

5. Claim File or injury Reported Under (*check one*):

6. Employee's Name and Address—
   If different from Claimant's:

7. Employer's Name and Address:

   Texas Gulfport Shipbuilding
   P. O. Box D
   Port Arthur, Texas 77640

8. Carrier Name and Address:

   Employers' Insurance of Texas
   5101 Gulfway Drive
   Port Arthur, Texas 77640

9. Nature of Injury or Occupational Disease:

   low back, right ankle

10. Date of Injury (*Month, Day, Year*):

    7-12-78

11. Date of Employer's First Knowledge of Injury (*Month, Day, Year*):

    7-12-78

12. Right to compensation is controverted for the following reason(s):

    The carrier respectfully contends that the employee earned an average of $304.79 prior to the accident.

    The carrier respectfully contends that the employee was treated by a physician of his own choice.

    The carrier respectfully contends that the employee has not yet reached maximum improvement and therefore the amount of permanent disability remaining is uncertain at this point.

13. Authorized Signature:

    /s/ JOHN R. VEAL

14. Title:

    Claims Representative Senior

15. Date of this Notice (*Month, Day, Year*):

    July 23, 1982

16. (OWCP USE) A copy of the form was mailed to the claimant and/or representative on July 28, 1982.

    Initials: JTS.

OMB Approval No. 044-R0893

NOTICE OF CONTROVERSION OF RIGHT TO COMPENSATION

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Longshore and Harbor Workers' Compensation

This report is authorized by law and regulation (33 USC 914(d), (e); 20 CFR 702.233). Failure to report when controverting right to compensation can result in liability for 10 per cent additional compensation.

INSTRUCTIONS: This form may be used by the employer/carrier to controvert the right to compensation. 33 USC § 914(a) requires the employer to pay compensation promptly and without an award unless the right to such compensation is controverted by the filing of this form. Failure either to pay each installment of compensation, or controvert the right to such compensation, within fourteen days after it becomes due may result in liability for additional compensation equal to ten percent of each installment not paid when due. 33 USC § 914(d), (e). If the right to compensation is controverted, this form should be submitted in triplicate to the Deputy Commissioner, and the reasons for such controversion should be fully stated in item 12. All prior issues of Forms LS-207 are obsolete and should not be used.

1. OWCP File No.:

   8-42728

2. Employer File No.:

3. Carrier File No.:

   36-78-50255

4. Claimant's Name and Address:

   Leroy Jackson
   1120 E. 15th St.
   Port Arthur, Texas 77640

5. Claim File or injury Reported Under (*check one*):

   LHWCA

6. Employee's Name and Address—
   If different from Claimant's:

7. Employer's Name and Address:

   Gulfport Shipbuilding Co.
   Port Arthur, Texas 77640

8. Carrier's Name and Address:

   TEIA
   P. O. Box 5410
   Beaumont, Texas 77706

9. Nature of Injury or Occupational Disease:

   Back

10. Date of Injury (*Month, Day, Year*):

    7-12-78

11. Date of Employer's First Knowledge of Injury (*Month, Day, Year*):

    7-12-78

12. Right to compensation is controverted for the following reason(s):

    Carrier contends claimant has reached maximum medical recovery and any present symptoms are on an arthritic basis, based on Dr. Cloud's report of 8-15-83.

    Carrier contends claimant has no disability from his injury as of 8-15-83, and any present disability is due to arthritic condition.

13. Authorized Signature:

    /s/ B. BEASLEY
    Barbara Beasley

14. Title:

    Sr. Claims Representative

15. Date of this Notice (*Month, Day, Year*):

    9-14-83

16. (OWCP USE) A copy of the form was mailed to the claimant and/or representative on 9-21-83.

    Initials: JB

OMB Approval No. 044-R0893

NOTICE OF CONTROVERSION OF RIGHT TO COMPENSATION

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Longshore and Harbor Workers' Compensation

This report is authorized by law and regulation (33 USC 914(d), (e); 20 CFR 702.233). Failure to report when controverting right to compensation can result in liability for 10 per cent additional compensation.

INSTRUCTIONS: This form may be used by the employer/carrier to controvert the right to compensation. 33 USC § 914(a) requires the employer to pay compensation promptly and without an award unless the right to such compensation is controverted by the filing of this form. Failure either to pay each installment of compensation, or controvert the right to such compensation, within fourteen days after it becomes due may result in liability for additional compensation equal to ten percent of each installment not paid when due. 33 USC § 914(d), (e). If the right to compensation is controverted, this form should be submitted in triplicate to the Deputy Commissioner, and the reasons for such controversion should be fully stated in item 12. All prior issues of Forms LS-207 are obsolete and should not be used.

1. OWCP File No.:

   8-42728

2. Employer File No.:

3. Carrier File No.:

   36-78-50255

4. Claimant's Name and Address:

   Leroy Jackson
   1128 E. 15th St.
   Port Arthur, Texas

5. Claim File or injury Reported Under (*check one*):

   LHWCA

6. Employee's Name and Address—
   If different from Claimant's:

7. Employer's Name and Address:

   Gulfport Shipbuilding
   Port Arthur, Texas

8. Carrier's Name and Address:

   TEIA
   Beaumont, Texas 77706

10. Date of Injury (*Month, Day, Year*):

    7-12-78

11. Date of Employer's First Knowledge of Injury (*Month, Day, Year*):

    7-12-78

12. Right to compensation is controverted for the following reason(s):

    Carrier controverts recommendation dated 9-28-83 for pmt. of compensation.

13. Authorized Signature:

    Barbara Beasley

14. Title:

    Sr. Claims Representative

15. Date of this Notice (*Month, Day, Year*):

    9-29-83

16. (OWCP USE) A copy of the form was mailed to the claimant and/or representative on _____.

    Initials: _____

Part 6: Legislative History to the 1984 Amendments To The Longshore Act

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1981

Tuesday, June 16, 1981

U.S. Senate
Subcommittee on Labor
Committee on Labor and Human Resources

Washington, D.C.

The subcommitte convened, pursuant to notice, at 9:30 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles and Hawkins.

Opening Statement of Senator Nickles

Senator Nickles. Good morning.

Today is the first of 3 days of hearings on the Longshoremen's and Harbor Workers' Compensation Act, and legislation that Senator Sam Nunn and I have proposed to amend Senate bill 1182.

When the act was first amended in 1972, it became a free ticket to rip off the consumer and taxpayer. So much so that in the 5 years after the changes were made, reported injuries jumped 185 percent. The chart to my right clearly shows that as benefits skyrocketed, the number of claims shot up right along with them. In 1972, 72,000 claims were filed. That number jumped to over 205,000 by 1977, meaning that nearly 1 in 5 employees filed a claim.

This act, in my opinion, has two fundamental problems: first, it is loaded with provisions that encourage fraud and corruption. Hearings before the Senate's Permanent Subcommittee on Investigations earlier this year, concluded that the act is abused by organized crime. Our first witness today, Senator Nunn, spearheaded the investigation on waterfront corruption. I am sure he will be able to shed more light on the subject today. Second, organized crime is attracted to the act because of its more-than-generous payouts as now provided.

I believe it is important to provide sound worker's compensation, but the Longshoremen's Act has become a national disgrace at a time when commonsense seems to be finding its way back into Government. Now is the time to revamp the act in line with commonsense policy.

There are many cases that describe the absurdity of the system, which would sound like horror stories to the average working man or woman, but are commonplace on our Nation's waterfronts.

Take one of the commonplace examples from Shippers Stevedoring Co. in Houston. One of their longshoremen injured his right forearm on the job in May of last year. Because of his $33,000 annual salary, he automatically received about $426 a week in tax-free compensation—which was the maximum at that time. They paid him for nearly a year, and he received a total of over $18,500. In addition to that, the man's doctor said the employee would have a 25 percent impairment for the next 61 weeks, and the company was forced to pay an additional $26,000 during that time. So the company paid a total of nearly $45,000 in 1 year, all of which was tax free.

But that is not all. While he was receiving the additional $26,000 because of his impairment, he was also working in another job and was earning about $25,000. The total two salaries, or the money that he made that year, exceeded $70,000 a year, $45,000 of which was tax free.

You can see by this graph that benefit increases in the act have far outstripped the growth of related economic indexes. In many cases, the benefits often exceed an employee's preinjury take-home pay. This is ludicrous, and goes way beyond the intent of worker's compensation.

The benefits under the Longshoremen's Act have increased 551 percent from the period 1972 to the present. Benefits in 1972 were $70; present matching benefits, $456—an enormous increase. At the same time, the cost of living increased 97 percent, the CPI index and the national average weekly wage also had enormous increases.

The act also includes an unlimited, annual tax-free escalation of disability benefits, an "unrelated death benefits" clause—meaning, for example, that if a person receiving disability benefits dies from a cause unrelated to his employment or injury, like an automobile accident, his survivors receive benefits—often more than the deceased could have received had he lived; injured employees may choose their own doctors for verifying injury claims; mandatory rehabilitation is not required, and all filed claims are presumed to be valid.

Coming from managing a small business in Oklahoma, where I was directly involved in worker's compensation administration, I am appalled that the Longshoremen's Act has been allowed to flourish unabated.

Last week, the New York Times published an editorial calling for changes in the act, citing the shipbuilding industry, where insurance costs have increased ninefold since 1970. In fact, according to recent statistics, for every $100 in salaries, employers are compelled to pay an additional $87.24 in compensation costs—this is in New York.

These outrageous costs are passed on to the shippers and three things are happening as a result:

First, as you can see in the diagram, many shippers are avoiding U.S. ports where they can, primarily working through Canadian ports where compensation costs are about $5 for every $100 in salaries. This needs to be compared to what they are in New York. For example, in the chart, it shows St. John, New Brunswick, where the rates presently are $3.40 per $100 of compensation. Compare that to only 400 miles south, in New York, the rates are $87. So if my math is somewhat correct, we are looking at almost 30 times the rate in New York for compensation costs as compared to what it is in Canada.

It is little wonder that shippers would go that 400 miles to save on such a tremendous burden. And for those who are not familiar with workers' compensation, when we talk about $87 per $100 of payroll, we are talking about if the employer pays an individual $20,000, he has to pay $16,000 to $17,000 in workers' compensation costs. We are saying 87 percent of compensation has to be paid in workers' compensation premiums.

Over 7 million tons of cargo were diverted through Canada in 1976 through 1979, which amounted to a little over $9 billion. Mexico will soon be in the business, as they are also building and expanding their ports.

Second, and very importantly, when business is diverted out of this country, jobs are lost. Entire companies can go out of business, and the whole Nation suffers as a result.

Another example of the act's depressive effects is here, in Washington, D.C., where all private employees are covered by the act. It is estimated that for every mile of track laid in the D.C. Metro system, employers paid $1.9 million in workers' compensation. Compensation rates in the District are several times higher than in neighboring Maryland or Virginia, even though this country has one of the cleanest records of work related injuries and illnesses. If every State's compensation program was operated like this, few businesses would be able to survive.

Third, all consumers are affected by the act. It is estimated that Longshore compensation costs can push up the wholesale price of an item by as much as 25 percent. Every additional cost is passed directly to you and me. The Government has turned its back on every consumer by not acting to correct the injustices in the act.

The act must be amended for purely economic reasons. My criticism is directed at the Government for allowing the act to mushroom beyond original intent, and against those groups or individuals who abuse the law for personal benefit. The legislation under consideration would help restore balance by removing obvious inequities, significantly reduce fraud and corruption, and ailing U.S. port authorities, and assure prompt delivery of generous compensation benefits and medical treatment to those deserving injured employees.

[The text of S. 1182 and graphs referred to follows]

Excerpt From H. Rep. No. 570, 98th Cong., 1st Sess. 17 (1983).

The Committee bill enhances other penalty provisions of the current Longshore Act, and makes them consistent with the federal criminal penalties for misrepresentation contained in title 18 of the United States Code at section 1001. The Committee believes that misrepresentation in connection with this program is as serious misconduct as misrepresentation in connection with other similar federal programs. Accordingly, Section 31(a) provides that knowing and willful making of false statements of representations in order to obtain benefits under this Act shall be a felony, punishable by a fine not to exceed $10,000 and imprisonment not to exceed five years, or both. Similarly, section 31(c) provides that any person, including employers or their agents or insurance carriers and their agents, who knowingly and willfully make false statements or representations for the purpose of denying compensation benefits to an individual, or reducing or teminating that individual's benefits, shall also be guilty of a felony, to be punishable by a fine not to exceed $10,000 or imprisonment or [sic] up to five years, or both. In the Committee's view, misrepresentation for the purpose of obtaining benefits, and misrepresentations for the purpose of denying an individual benefits, or for the purpose of reducing or terminating that individual's benefits are matters of equal gravity. All parties should approach the compensation system in good faith, with the objective of insuring that a disabled worker receives the compensation to which he or she may be entitled due to the work-related injury or disease. Misrepresentation of material facts deny

claimants justice under the Act, and present an unnecessary and costly burden on the compensation system.

Excerpt from S. Rep. No. 81, 98th Cong., 1st Sess. 37 (1983).

Section 31 has been altered considerably to reflect concern over potential abuse of the benefit payment aspect of the act. Testimony at the hearings as well as evidence gathered from those charged with administering the act indicated that attempts have been made by some individuals to procure benefits through fraudulent means. Similarly, there is a significant body of evidence to indicate that employers and insurance carriers, on occasion, have denied benefits or substantially delayed their delivery through equally illegal methods. This section attempts to reduce the incentive to acquire or deny benefits through illegal means. Stringent penalties, including fines of up to $25,000 and jail terms not to exceed 3 years, have been introduced to replace the light level of punishment available under earlier law. The existence of these penalties should curb potential abuses of the system by all parties, resulting in the prompt disposition of all deserving claims.

Excerpt from Article Entitled "Mystery of Insurance Rates in Workers' Compensation," Which Was Inserted into the Hearing Record of Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings on S. 1182 Before the Subcomm. on Labor, Comm. on Labor and Human Resources, 97th Cong., 1st Sess. 433 (1981).

The charge brought by the Rating Board that higher benefits encourage claimants to seek workers' compen-

sation benefits only shows that the insurance industry has never really accepted workers' compensation as an assured right of the injured worker and still considers it something to be fought against at every turn in order to minimize disbursements to claimants. Thus, every loophole in the law and every trick in the administrative procedure has been used by the carriers to achieve this goal. As has been stated years ago in various studies of New York's workers' compensation system, carriers and employers controvert claims first, then investigate to see whether their denials of liability are meritorious.

Id. at 516-23. Excerpts from Statement Prepared by International Longshoremen's and Warehousemen's Union

Contrary to the circulating rhetoric, however, it is employers rather than workers who have become expert in abusing the Act. In ILWU's jurisdiction, there have been many cases of company attempts to improperly influence a claimant's selection of physician, or to influence the physician's medical opinion, cases of benefits terminated before the treating physician has authorized the claimant's return to work; refusals to authorize medical care requested by the claimant's treating physician; and delay and refusals to pay incurred medical bills. If desired, we will be happy to document these cases.

. . . .

. . . As we stated earlier, the injured worker in need of immediate care and income protection is in a far more vulnerable position than his employer or longshore insurance carrier, and the provisions that S. 1182 would change provide for no more than a balanced contest.

Even under the Act's present language, and despite the best efforts of the Department of Labor, we have cases of members virtually having been forced to accept settlements far below their proper entitlements.

Id. at 545. Excerpt from Analysis of S. Bill 1182 Submitted by International Longshoremen's and Warehousemen's Union.

Take the following example. While on disability and receiving medical care, a worker is required to report to a doctor selected by the employer. Typically, and usually despite a different assessment from the treating physician who has had the patient under observation for some time, the doctor selected by the employer pronounces the worker able to return to work, on the basis of one examination. The company then suspends further benefits and controverts the need for extended medical care, despite the fact that the present procedures require referral to an independent and impartial medical evaluator. Injured workers then face the prospect of either continued care from their own doctor without receiving compensation benefits, until the case can be resolved, by trial if necessary, or returning to work before they are able properly to do so. In the first case, injured workers suffer increasing tension and aggravation as their bills mount and they watch their hard earned savings and resources dwindle away.

Id. at 563-67. Excerpts from a Hypothetical Case Presented by International Longshoremen's and Warehousemen's Union.

In the example just cited, what happens to an employer if Mr. Harrison should prosecute a claim under the

proposed Amendments and should prove that the employer *wrongly* denied him benefits, for example, because the prevailing retirement age in Southern shipyards in fact is 65, not 62? Nothing, there is not a single penalty imposed upon the employer whatsoever, except delayed payment of the very compensation benefits which should have been paid to Mr. Harrison years earlier, before he was forced into bankruptcy. Under the proposed amendments, all penalties for denying benefits are removed *no matter how wrongful, unjustified, or blatantly vexatious that denial might be.* (emphasis in original)

. . . .

It has already been shown that under the proposed Amendments an injured maritime worker will have a difficult time prosecuting even the most routine of compensation claims. Under existing law, an employer is required to pay benefits once a Compensation Order has been issued by an Administrative Law Judge or the employer faces penalties even if he appeals the Order. In most litigated claims, the injured worker has already been subjected to many months without benefits. . . .

. . . .

Even if it should be proved, at the end of this long, tiresome process that the employer's initial decision to refuse benefits was illegal, totally unjustified, and made only for the purpose of harassing and gaining financial leverage over the injured worker, there is no recompense. The proposed Amendments *eliminate* all penalties of every kind whatsoever against even the most blatantly oppressive employer, for taking even the most groundless appeals. (emphasis in original)

Id. at 572-73. Excerpt from a Transcript of a Television Program Presented by International Longshoremen's and Warehousemen's Union.

Mr. Milito:

When a longshoreman is injured under the Act, the employer is required to pay a weekly compensation benefit up to $426 until the worker returns to work, and pay all medical bills. In practice, however, it doesn't always work that way. Bob Olvera suffered injuries to his neck, shoulder and back which kept him in the hospital for several weeks.

Mr. Olvera:

I was sent by stevedore company to a psychiatrist even after numerous doctors agreed that I was not able to perform longshore work. After a short ten minute interview with a psychiatrist they said I was able to resume work and they stopped my compensation at that time, and never did get it resumed until I went to court.

Mr. Milito:

Anthony Agundez was at work in the hold of the ship when he had his accident.

Mr. Agundez:

I had hold of the steering and the wheel fell in the hole and it jerked my arm across my body and I pulled all the muscles and everything and I jammed the two bones up here and they had to take a piece of bone out of there in '79 and during that time, after I was off work for about three months, they stopped my workmen's compensation.

Mr. Milito:

Agundez reinjured his arm this year and went another four months without compensation. Jimmy Hall fell from a hyster and crushed three discs in his back. After extensive treatment his doctor scheduled him for sugery, then the company stepped in.

Mr. Hall:

When I arrived home, Metropolitan was on the phone talking to my children wanting them to relay the message to me, that the insurance office at Metropolitan had decided I didn't need surgery and therefore they were cancelling surgery and they were going to set me up some more appointments with some of their doctors for later on.

Mr. Milito:

These men believe that the company, Metropolitan Stevedor [sic], by cutting off their benefits or in one case just forgetting to mail them, and by pressuring their doctors, was attempting to get them to return to work before they were ready. They call that "hardtiming".

Id. at 587-589. Letter Sent by Attorney for Claimant Under The Longshore Act of Stevedore's Attorney.

I called your office twice yesterday and left messages for you to call me on this case. You apparently were in court all day and unable to respond to my telephone messages.

I met you at the California Workers' Compensation Appeals Board this morning.

I asked you if you were aware that your client, Metropolitan Stevedore had filed an LS-208 form in this case. You stated that you were cognizant of this fact.

I asked you if they intended to terminate Mr. Agundez's compensation benefits at this time. You stated that you intended to file a Notice of Controversion and that, in fact, your client had terminated compensation benefits as of the date of the LS-208 form.

I stated to you that it has always been the policy of the Department of Labor, especially in cases such as this, not to terminate compensation benefits until after a Conference has been held. You stated "you say that, I don't know that".

I informed you that Mr. Agundez is scheduled for surgery to his injured shoulder on August 22, 1979. That surgery has been scheduled and will be performed by his treating physician, Jordan Rhodes, M.D. You stated that that made no difference to you and asked me if I knew what filing an LS-208 form by your client meant. I informed you that I consider this action of your client to be just another instance of intentional infliction of emotional harm upon Mr. Agundez and his wife. I informed you that I intended to pursue all legal remedies.

Let me review with you your client's conduct in this case.

On February 9, 1979, I discussed this case with Mr. Tisius at Metropolitan Stevefore Company. I informed Mr. Tisius that Mr. Agundez after an attempt to return to work had consulted with Dr. Hubbard at the Kaiser facility. Dr. Hubbard referred the claimant to Jordan Rhodes, M.D., a specialist in orthopedics for evaluation.

A day or two subsequent Mr. Tisius claimed that his office had checked with Dr. Hubbard and had been advised that Dr. Hubbard had not referred the claimant to Jordan Rhodes, M.D. He denied Metropolitan's liability for expenses incurred for Dr. Rhodes's treatment. I informed Mr. Agundez of this matter and he became very emotionally upset. Without my knowledge, he went to Dr. Hubbard and obtained a statement signed by the doctor that Dr. Hubbard had, in fact, referred the claimant to Dr. Rhodes. A copy of that document is in the Department of Labor's file and your file.

On March 19, 1979, Mr. Tisius and I agreed that the claimant might be examined by Dr. William Rhorer as an Independent Medical Examiner. It was further agreed that compensation benefits would be reinstated subject to Dr. Rhorer's report.

On April 22, 1979, Metropolitan Stevedore terminated compensation benefits and filed a Notice of Controversion on April 30, 1979. Benefits were terminated. Again this created tremendous financial hardships for the Agundez's.

A Conference was held on May 25, 1979, before Edward Corley, Assistant Deputy Commissioner. Mr. Corley found Metropolitan Stevedore's actions unjustified and recommended that temporary disability benefits should be reinstated immediately and retroactive to April 23, 1979. In addition, he ordered that attorneys fees be paid to my office and that Dr. Rhodes bill be paid.

Compensation benefits were reinstated and paid through July 22, 1979. The attorneys fees awarded have not been paid to date. Dr. Rhodes bill was finally paid on July 9, 1979.

On July 26, 1979, you served upon me the medical report of Jordan Rhodes, M.D. dated, July 23, 1979 and the medical report of James London, M.D. dated, July 16, 1979. Please refer to the fourth paragraph of Dr. Rhodes report of July 23, 1979. The doctor in substance notes that on July 12, 1979, Mr. Agundez's shoulder was injected and following that injection the patient was completely free of pain for three to four days. You will note that Dr. London saw Mr. Agundez during this period of time. You will further note that Dr. Rhodes reports that the pain returned and Mr. Agundez's only alternative is surgery. That surgery is scheduled for August 22, 1979.

In spite of your client's conduct which I believe clearly demonstrates that they have intentionally forced financial hardships upon Mr. and Mrs. Agundez that have led to severe emotional upset for both Mr. and Mrs. Agundez, I ask that you contact Metropolitan Stevedore at your earliest convenience and review this matter with them. Please point out to them that they did not seek to have Mr. Agundez re-examined by Dr. Rhorer in order to determine whether or not his condition was, in fact, permanent and stationary. Instead they "doctor shopped" until they found someone who was in a position to note that the patient was permanent and stationary and had no disability. Please discuss the impact of *Renteria v. Orange* [82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (Cal. App. 1978) (an action by an employee against his employer and co-workers for the intentional infliction of emotional distress)] with your client.

If I have in anyway misinterpreted your client's intentional inflection [sic] of emotional harm upon Mr. Agundez, now is there [sic] chance to demonstrate that I am

wrong and for them to act in good faith. Rather than inflicting more suffering on Mr. and Mrs. Agundez, it appears to me that the humane course of action would be to pay Mr. Agundez his disability benefits until the time that we can obtain an emergency Informal Conference with the Department of Labor.

. . . .

Yours very truly,

Part 7: Insurance Regulations Under The Longshore Act
(20 C.F.R. §§ 703.101-703.121)

Insurance Regulations
(20 C.F.R. §§ 703.101-703.121)

AUTHORIZATION OF INSURANCE CARRIERS

§ 703.101 Types of companies which may be authorized by the OWCP.

The OWCP will consider for the granting of authority to write insurance under the Longshoremen's and Harbor Workers' Compensation Act and its extensions the application of any stock company, mutual company or association, or any other person or fund, while authorized under the laws of the United States or of any State to insure workmen's compensation. The term "carrier" as used in this part means any person or fund duly authorized to insure workmen's compensation benefits under said Act, or its extensions.

§ 703.102 Applications for authority to write insurance; how filed; evidence to be submitted; other requirements.

An application for authority to write insurance under this Act shall be made in writing, signed by an officer of the applicant duly authorized to make such application, and transmitted to the Office of Workmen's Compensation Programs, U.S. Department of Labor, Washington, D.C. 20211. Such application shall be accompanied by full and complete information regarding the history and experience of such applicant in the writing of workmen's compensation insurance, together with evidence that it has authority in its charter or form of organization to write such insurance, and evidence that the applicant is

currently authorized to insure workmen's compensation liability under the laws of the United States or of any State. The statements of fact in each application and in the supporting evidence shall be verified by the oath of the officer of the applicant who signs such application. Each applicant shall state in its application the area or areas in which it intends to do business. In connection with any such application the following shall be submitted, the Office reserving the right to call for such additional information as it may deem necessary in any particular case:

(a) A copy of the last annual report made by the appellant to the insurance department or other authority of the State in which it is incorporated, or the State in which its principal business is done.

(b) A certified copy from the proper State authorities of the paper purporting to show the action taken upon such report, or such other evidence as the applicant desires to submit in respect of such report, which may obviate delay caused by an inquiry of the OWCP of the State authorities relative to the standing and responsibility of the applicant.

(c) A full and complete statement of its financial condition, if not otherwise shown, and, if a stock company, shall show specifically its capital stock and surplus.

(d) A copy of its charter or other formal outline of its organization, its rules, its bylaws, and other documents, writings, or agreements by and under which it does business, and such other evidence as it may deem proper to make a full exposition of its affairs and financial condition.

§ 703.103 Stock companies holding Treasury certificates of authority.

A stock company furnishing evidence that it is authorized to write workmen's compensation insurance under the laws of the United States or of any State, which holds a certificate of authority from the Secretary of the Treasury as an acceptable surety on Federal bonds, unless requested to do so, need not transmit to the Office with its application copies of such financial reports as are on file in the Department of the Treasury. The acceptance by that Department of such a company will be considered by the Office in conjunction with the application of such company, provided there has been compliance with the other requirements of the regulations in this part.

§ 703.104 Applicants currently authorized to write insurance under the extensions of the LHWCA.

Any applicant currently authorized by the Office to write insurance under any extension of the LHWCA need not support its application under the LHWCA or any other LHWCA extension with the evidence required by the regulations in this part, except the form of policy and endorsement which it proposes to use, unless specifically requested by the Office, but instead its application may refer to the fact that it has been so authorized.

§ 703.105 Copies of forms of policies to be submitted with application.

With each application for authority to write insurance there shall be submitted for the approval of the Office copies of the forms of policies which the applicant proposes to issue in writing insurance under the LHWCA, or its extension, to which shall be attached the appropriate endorsement to be used in connection therewith.

§ 703.106 Certificate of authority to write insurance.

No corporation, company, association, person, or fund shall write insurance under this Act without first having received from the OWCP a certificate of authority to write such insurance. Any such certificate issued by the Office, after application therefor in accordance with these regulations, may authorize the applicant to write such insurance in a limited territory as determined by the Office. Any such certificate may be suspended or revoked by the Office prior to its expiration for good cause shown, but no suspension or revocation shall affect the liability of any carrier already incurred. Good cause shall include, without limitation, the failure to maintain in such limited territory a regular business office with full authority to act on all matters falling within the Act, and the failure to promptly and properly perform the carrier's responsibilities under the Act and these regulations, with special emphasis upon lack of promptness in making payments when due, upon failure to furnish appropriate medical care, and upon attempts to offer to, or urge upon, claimants inequitable settlements. A hearing may be requested by the aggrieved party and shall be held before the Director or his representative prior to the taking of any adverse action under this section.

§ 703.107 Period of certificate of authority.

No certificate of authority to write insurance under said Act and the regulations in this part shall be issued by the Office for a period in excess of 18 months. The expiration date which shall be stated in the certificate of authority, shall fall on the 30th day of June.

§ 703.108 Applications for reauthorization.

Any carrier holding an unexpired certificate of authority and desiring reauthorization to write insurance for the period of a year from the expiration of such certificate shall apply to the OWCP by letter over the signature of an authorized officer for such a certificate of authority. No evidence of the financial condition of such carrier need be furnished unless requested by the Office after the application is received. The Office may require such carrier to submit, for Office consideration in connection with such reauthorization, evidence or explanation relating to the experience and practice of such carrier in the conduct of its affairs with respect to the said Act, or with reference to the fidelity and punctuality of the performance by such carrier of its past or current obligations under the law. Such application, to avoid a break in the period of authorization of the carrier to write such insurance, should be filed with the Office not later than June 1 of each year.

§ 703.109 Longshoremen's endorsement; see succeeding parts for endorsements for extensions.

(a) The following form of endorsement applicable to the standard workmen's compensation and employer's liability policy, shall be used, if required by the OWCP, with the form of policy approved by the Office for use by an authorized carrier:

For attachment to Policy No._____,

The obligations of the policy include the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., and all laws amendatory thereof or supplementary thereto which may be or become effective while this policy is in force.

The company will be subject to the provisions of 33 U.S.C. 935. Insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the company from payment of compensation and other benefits lawfully due for disability or death sustained by an employee during the life of the policy.

The company agrees to abide by all provisions of this Act, and all lawful rules, regulations, orders, and decisions of the Office of Workmen's Compensation Programs, U.S. Department of Labor, unless and until set aside, modified, or reversed by appropriate appellate authority as provided for by said Act.

This endorsement shall not be cancelled prior to the date specified in this policy for its expiration until at least 30 days have elapsed after a notice of cancellation has been sent to the Deputy Commissioner and to this employer.

All terms, conditions, requirements, and obligations, expressed in this policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

§ 703.110 Other forms of endorsements and policies.

Where the form of endorsement prescribed by § 703.109 is not appropriate when used in conjunction with a form of policy approved for use by the Office no modification thereof shall be used unless specifically approved by the Office. Where the form of policy is designed to include

therein the obligations of the insurer under said Act without the use of the appropriate endorsements, the policy shall contain the provisions required to be included in any of the endorsements. Such a policy, however, shall not be used until expressly approved by the Office.

§ 703.111 Submission of new forms of policies for approval; other endorsements.

No new forms of policies or modification of existing forms of policies shall be used by an insurer authorized by the Office under the regulations in this part to write insurance under said Act except after submission to and approval by the Office. No endorsement altering any provisions of a policy approved by the Office shall be used except after submission to and approval by the Office.

§ 703.112 Terms of policies.

A policy or contract of insurance shall be issued for the term of not less than 1 year from the date that it becomes effective, but if such insurance be not needed except for a particular contract or operation, the term of the policy may be limited to the period of such contract or operation.

§ 703.113 Marine insurance contracts.

A longshoremen's policy, or the longshoremen's endorsement provided for by § 703.109 for attachment to a marine policy, may specify the particular vessel or vessels in respect of which the policy applies and the address of the employer at the home port thereof. The

report of the issuance of a policy or endorsement required by § 703.116 to be made by the carrier shall be made to the deputy commissioner for the compensation district in which the home port of such vessel or vessels is located, and such report shall show the name and address of the owner as well as the name or names of such vessel or vessels.

§ 703.114 Notice of cancellation.

Cancellation of a contract or policy of insurance issued under authority of said Act shall not become effective otherwise than as provided by 33 U.S.C. 936(b); and notice of a proposed cancellation shall be given to the deputy commissioner and to the employer in accordance with the provisions of 33 U.S.C. 912(c), 30 days before such cancellation is intended to be effective.

§ 703.115 Discharge by the carrier of obligations and duties of employer.

Every obligation and duty in respect of payment of compensation, the providing of medical and other treatment and care, the payment or furnishing of any other benefit required by said Act and in respect of the carrying out of the administrative procedure required or imposed by said Act or the regulations in this part upon an employer shall be discharged and carried out by the carrier except that the prescribed report of injury or death shall be sent by the employer to the deputy commissioner and to the insurance carrier as required by 33 U.S.C. 930. Such carrier shall be jointly responsible with the employer for the submission of all reports,

notices, forms, and other administrative papers required by the deputy commissioner or the Office in the administration of said Act to be submitted by the employer, but any form or paper so submitted where required therein shall contain in addition to the name and address of the carrier, the full name and address of the employer on whose behalf it is submitted. Notice to or knowledge of an employer of the occurrence of the injury or death shall be notice to or knowledge of such carrier. Jurisdiction of the employer by a deputy commissioner, the Office, or appropriate appellate authority under said Act shall be jurisdiction of such carrier. Any requirement under any compensation order, finding, or decision shall be binding upon such carrier in the same manner and to the same extent as upon the employer.

§ 703.116 Report by carrier of issuance of policy or endorsement.

Each carrier shall report to the deputy commissioner assigned to a compensation district each policy and endorsement issued by it to an employer who carries on operations in such compensation district. The report shall be made in such manner and on such form as the district or the Office may require.

§ 703.117 Report; by whom sent.

The report of issuance of a policy and endorsement provided for in § 703.116 shall be sent by the home office of the carrier, except that any carrier may authorize its agency or agencies in any compensation district to make such reports to the deputy commissioner, provided the carrier shall notify the deputy commissioner in such district of the agencies so duly authorized.

§ 703.118 Agreement to be bound by report.

Every applicant for authority to write insurance under the provisions of this Act, or for the renewal of that authority, shall be deemed to have included in its application an agreement that the acceptance by the deputy commissioner of a report of the issuance of a policy of insurance, as provided for by § 703.116, shall bind the carrier to full liability for the obligations under this Act of the employer named in said report, and every certificate of authority to write insurance under this Act shall be deemed to have been issued by the Office upon consideration of the carrier's agreement to become so bound. It shall be no defense to this agreement that the carrier failed or delayed to issue the policy to the employer covered by this report.

§ 703.119 Report by employer operating temporarily in another compensation district.

Where an employer having operations in one compensation district contemplates engaging in work subject to the Act in another compensation district, his carrier may submit to the deputy commissioner of such latter district a report pursuant to § 703.116 containing the address of the employer in the first mentioned district with the additional notation "No present address in _____ compensation district. Certificate requested when address given."

§ 703.120 Name of one employer only shall be given in each report.

A separate report of the issuance of a policy and endorsement, provided for by § 703.116, shall be made

for each employer covered by a policy. If a policy is issued insuring more than one employer, a separate report for each employer so covered shall be sent to the deputy commissioner concerned, with the name of only one employer on each such report.

§ 703.121 Multiple policies covering the same employer in the same compensation district prohibited; action upon receipt of a second report.

An employer operating within any compensation district shall have such operations in that district insured by not more than one insurance carrier. Accordingly, where a report provided for by § 703.116 is received, and where reports on file show that a named employer is insured by another insurance carrier under a policy with an unexpired term, the deputy commissioner shall inform the employer of the pre-existing coverage and of OWCP's prohibition against multiple policies.

Part 8: Decision of the ALJ

U.S. DEPARTMENT OF LABOR
Employment Standards Administration

Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

September 27, 1984

Case No: 84-LHC-629
File No: 8-42728
Re: Leroy Jackson

Leroy Jackson; 1128 East 15 Street; Port Arthur, TX 77640
Richard Schechter, atty; 525 Webster; Houston, TX 77002
Gulfport Shipbuilding Co.; P. O. Box D; Port Arthur, TX 77640
Texas Employers' Insurance Assn.; P. O. Box 5410; Beaumont, TX 77706
John Cash Smith, atty; P. O. Box 189; Orange, TX 77630

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order have been dated and filed in the Deputy Commissioner's Office. Procedures for appealing are described on the back of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within 10 days, notwithstanding the filing of

an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, Suite 757, 1111 - 20th Street, N.W., Washington, D.C. 20036.

Sincerely,

/s/ JAMES T. SMITH
James T. Smith
Deputy Commissioner

Enclosure
mb

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 84-LHC-629

OWCP NO. 8-42728

In the Matter of

LEROY JACKSON
Claimant

v.

GULFPORT SHIPBUILDING COMPANY
Employer

and

TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Carrier

DECISION AND ORDER —
AWARDING BENEFITS

This proceeding involves a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901 *et seq.* (hereinafter referred to as "the Act"), and its implementing rules and regulations reflected in 20 C.F.R. Parts 701 and 702.

Procedural History — Issues

This matter was, on 12/2/83, referred to the Office of Administrative Law Judges for formal hearing in ac-

cordance with Subpart C, Section 702 of 20 C.F.R., with the private parties' Form LS-18s attached, all documents and the referral bearing OWCP #8-42728. (Marked ALJ Exhibit #1) Respondents' counsel indicated at hearing that the item #5 statements of their LS-18 should in fact have appeared in item #6.

The hearing was held in Beaumont, Texas, on May 3, 1984 at which the private parties were represented by counsel, and the Solicitor did not appear. While § 8(f) is listed as an issue in item #7, not item #6, of respondents' LS-18, it is unclear from ALJ Exhibit #1 whether in fact the agency at transmittal appreciated the basis for respondents' § 8(f) contention as presented at hearing; or that the appropriate Department officials responsible for defending on behalf of the Special Fund were properly notified of these formal hearing proceedings. They are not listed as parties on the List of Parties attached to the 12/2/83 Deputy Commissioner referral.

The injury claim which is the basis of OWCP #8-42728 is a 7/12/78 injury suffered by Claimant while in Gulfport's employ. When stipulations were sought prior to opening the record 5/3/84 the carrier represented that in fact additional post 7/12/78 injuries suffered in Gulfport's employ were involved here, the basis of their § 8(f) relief claim, i.e., that whatever permanent disability, if any, the Claimant might be found to be under was the result of these post 7/12/78 injuries in combination with the 7/12/78 injury's permanent disability, if any, for which they should be afforded Special Fund relef.

This contention came as a surprise to Claimant's counsel, particularly based on the Deputy Commission's

12/2/1983 referral of only one injury claim number, OWCP #8-42728, used throughout this file for the 7/12/78 injury. Under these circumstances and §§ 702.-317(d), 702.366(a) before trial it appeared this new issue would form the basis for a remand of this matter to the Deputy Commissioner. However, the Claimant being without compensation benefits since mid-9/1983; this subsequent injury issue coming as a surprise to his counsel, with no indication of such on respondents' LS-18; with an indication that the 7/1983 action the Deputy Commissioner recommended the carrier should take if they wished to contend the disability averred was the result of additional post 7/12/78 industrial accidents, rather than a continuation of the 7/12/78 injury at issue, was not taken by respondents, it was determined that formal hearing would proceed, at which the only injury claim at issue was and would be that based on OWCP #8-42728, the 7/12/78 injury.

Based on what both sides represented had transpired at the agency level relative to the post 7/12/78 industrial incidents, no claim/notice of injury based on same had ever been filed, which could be consolidated with this case for formal hearing, the 7/12/78 LS-203 referred to in ALJ #1 being based on the 7/12/78 injury only. (9/19/83 Notice of Informal Conference in Cl Ex. #1). Thus at trial the parties were advised the issues for decision would be:

1. nature, extent, duration of disability resulting from 7/12/78 injury, with a contention by respondents the claimed disability is attributable to, causally related to, and results from post 7/12/78 injuries which do not form the basis of this claim, OWCP #8-42728;

2. § 10(f) adjustments;

3. attorneys fees/costs.

However as reflected in the 6/13/84 Order issued and incorporated in this record, all parties, including the deputy commissioner and Solicitor were advised of the undersigned's determination, in accord with §§ 702.366, 702.345 20 C.F.R. to consider the following additional issues:

1. whether subsequent to the 7/12/78 industrial injury suffered in Gulfport's employ the Claimant suffered any other industrial injuries in the course and scope of his employment with Gulfport, and which arose out of his employment, and particularly on 5/3/82 did such an injury occur;

2. nature, extent, duration of any disability causally related to any industrial injury suffered in Gulfport's employ subsequent to 7/12/78, and particularly as of 5/3/82;

3. average weekly wage as of any post 7/12/82 industrial injury in Gulfport's employ, and particularly as of 5/3/82;

4. § 8(f) applicability to any industrial injury suffered by Claimant in Gulfport's employ subsequent to 7/12/82, and particularly as of 5/3/82.

In deciding post 5/3/84 to consider these issues, consideration was given to the effect of any § 12, § 13 defenses on the party not present, but potentially affected by the outcome of such issues' consideration, the Special Fund's representative. However a July 12, 1982 compensation claim was filed, albeit based on Claimant's reasonable belief his post 5/3/82 disability was entirely

attributable to the 1978 injury; and while the Claimant did not report a new injury to employer following the 5/3/82 injury (TR 115), Dr. Haig's 5/10/82 letter to both respondents and the Department is viewed as timely notice to all of the 5/3/82 industrial incident.

To date the response to my 6/13/84 Order has been Claimant's counsel's 7/5/84 letter incorporated into this record, with the attached copy of a two page Employer's Wage Statement form certified by Gulfport's paymaster reflecting Claimant's earnings in the 5/1981 to 5/1982 period, all marked Claimant's Exhibit 6. This Exhibit is admitted into this record on the absence of any objection from respondents' counsel who was served with a copy of the 7/5/84 letter to this office. Similarly, Respondents' Exhibit 5 attached to respondents' counsel brief, the one page 6/22/84 statement of Emily Stuart, payroll supervisor is incorporated into this record. A post-hearing brief was received from both counsel.

Incorporated into this record is the one page Pre Hearing Order of Deputy Associate Chief Burch dated 3/1/84 which was attached to the 3/1/84 Notice of Hearing, as well as the one page notice also attached thereto headed, LHC Notice all marked ALJ Exhibit 2 (5 pages).

It is also determined that the testimony of Allen Simons, memorialized at trial is hereby incorporated into this record, over Claimant's objection.

The following findings of fact are made determinative of all these issues now before me based on consideration of the record established by the parties, my evaluation of the testimonial evidence, weighed with the stipulations entered into by counsel and their oral arguments.

Findings of Fact

Background Facts

The Claimant born 4/17/39 is a 45 year old shipfitter with a 6th grade education whose non-shipyard vocational history has been mainly unskilled and heavy in nature, exclusive of some truck driving work experience. Almost six years ago, on 7/12/78, while working on this employer's barge he slipped and fell spraining his low back and seriously twisting his right ankle, suffering the industrial injury which is the basis of the claim referred for formal hearing (Deputy Commissioner's referral) at issue. His average weekly wage at 7/12/78 injury was $304.78 (compensation rate $203.19 weekly).

Medical History — July 12, 1978

Shortly after the 7/12/78 injury the Claimant came under the care of Dr. Haig, a Board certified orthopedic surgeon who continues as his treating specialist, and who has treated and cared for the Claimant's orthopedic complaints over the intervening years. When Dr. Haig (on 10/20/1978) recommended the Claimant return to work although still sore in back and ankle, the Claimant (on 10/30/78) did so, his temporary total compensation which had been paid since 7/13/78 being terminated 10/29/78.

Dr. Haig was of the opinion based on his clinical findings as he explained in his testimony that there was a strong possibility of some disc involvement in his 7/12/78 back sprain injury; there was calcification in his right ankle residual to the 1978 injury and he had

mild to moderate arthritis then evident to Dr. Haig on x-ray. Dr. Haig who has followed the Claimant regularly to date believes that residual to, and related to the 7/12/78 injury the Claimant has a degenerated L-4 disc which is probably ruptured, with his L-5 disc also degenerated, which condition presently precludes him from lifting over ten pounds repetitively, or over 25 pounds more than once an hour; precludes climbing aboard ships, stooping, crawling or working in confined spaces with symptomatology to be incurred on bending more than three times an hour, or standing more than 20 minutes at a time, limitations which preclude his return to his usual shipyard work. There are however no limitations on the Claimant's sitting ability residual to his back condition and 7/12/78 injury. (11/12/82 was the first date post 7/2/82 that Dr. Haig opined the Claimant unable to perform any type of gainful work due to these limitations, although as early as 10/1981 he suggested Claimant bid for lighter work.)

December 1978

The Claimant advised Dr. Haig he felt fairly well after his 10/30/78 return to work for almost six weeks and until 12/1/78 when his low back pain became progressively worse. On 12/6/78 he told Dr. Haig he received heat treatments for his back at the plant's first-aid office before returning to him on 12/6/78 with such severe lumbar spasms this specialist was surprised at his semi-flexed walk and distress. He immediately hospitalized the Claimant for traction. The Claimant's recovery was slow, given the severe lumbar spasms, his severe lumbar scoliosis, poor posture, prominent abdomen but by late 3/19/79 Dr. Haig recommended the Claimant return to

work, with the hope there would be no recurrence of his back pain symptoms such as occurred in 12/78 with his heavy shipyard work. His temporary total compensation benefits ceased with his return to work as of 3/26/79. On 8/28/79 when evaluated by Dr. Cloud, a Board certified orthopedic surgeon at respondents' request, he found that the Claimant's residual back symptomatology was due to his moderate lumbar degenerative arthritis changes aggravated by the 7/12/78 back injury and he had a permanent partial right ankle disability of ten percent. Claimant's Ex. 3.

October 1979

Six months after his 3/19/79 return to work, on 10/2/79 he returned to Dr. Haig with a recurrence of his low back pain of four days duration, referred according to Dr. Haig's 10/4/79 report, by this employer. He was again hospitalized for ten days of traction when his pain did not improve. When Dr. Haig recommended to the Claimant he try a return to work effective 11/19/79, with residual stiffness which Dr. Haig believed would take a long time to disappear, the Claimant did so, his temporary total compensation benefits again terminating.

April 1980

Dr. Haig's reports reflect that on 4/30/80, five months after his 11/19/79 return to work, the Claimant was referred back to Dr. Haig by this employer's first-aid nurse for examination and treatment of the 4/29/80 return to his low pain with right leg radiation due, according to Dr. Haig's 4/30/80 statements, "to new injuries aggravated by the continuous work at the ship-

yard." Dr. Haig again instituted treatment, this time conservative in nature, which returned the Claimant back to his shipfitter work on 6/30/80, after his receipt of temporary total compensation for the intervening two months he was off work following the 4/29/80 return of this back symptomatology. Dr. Haig has stated throughout his treatment reports, as he attested, that surgery would not be a treatment choice for this Claimant due to his poor orthopedic build, his prominent abdomen and lordosis.

August 1981

The Claimant worked as a shipfitter for over a year before again having, on 8/5/81, a recurrence of back pain with severe lumbar spasm for which he saw Dr. Haig on an emergency basis, with sluggish reflexes on examination. At that time he reported that until 8/5/81 he had done very well on being sent back to shipfitter work thirteen months before. When his pain and spastic condition did not respond to conservative measure he was again hospitalized for traction. With the improvement of his symptoms following hospital discharge Dr. Haig recommended he return to work 10/12/81 and advised he should consider bidding on a lighter job. The Claimant returned to his usual work however, being paid total compensation for the period 8/5/81 to 10/11/81 based on the 7/12/78 injury's compensation rate, and on 1/13/82 Dr. Haig advised the Claimant had an 15% whole man impairment based on his back residuals of the 7/12/78 injury, which from time to time required intensive medical care. Dr. Haig in effect then opined a 15 percent permanent partial disability.

May 1982

On 5/7/82, again about six months after his return to work during which he reported he had been doing well until 5/3/82, the Claimant was back in Dr. Haig's office on an emergency basis in severe low back distress again with lumbar spasm. The Claimant told Dr. Haig that on 5/3/82 he reinjured his low back when he lifted a drip pan and experienced the onset of low back pain, into his right leg. Dr. Haig again hospitalized the Claimant because his symptoms including bilateral sciatica did not improve with bed rest and conservative treatment. Dr. Haig was planning on returning the Claimant to his usual work duties but in fact the Claimant was unable to, and has not returned to any work actively since 5/5/82, the day he tried to work despite the symptoms arising from the 5/3/82 drip pan incident the workday before.

Following hospitalization his symptoms seemed to progressively but slowly improve. Dr. Haig, given his past back history, in the summer of 1982 anticipated a slow recovery. However, by 11/12/82 despite Dr. Haig's use of "every conservative means I know" the Claimant continued to have low back signs, but now he had, post the 5/3/82 incident, continuing pain, spasm and limitation of motion in his cervical spine, as Dr. Haig explained in his testimony caused by the Claimant's spine's reaction and accommodation to his lumbar spine limitation.

Over the next several months, into 2/1983 Dr. Haig reported the continuation of his backache and sciatica problems, expressing the opinion that absent very light duty the Claimant's continuing back problems, which Dr. Haig now did not believe would significantly abate, precluded his return to his usual heavy shipyard work.

Surgery (fusion) would not benefit him in Dr. Haig's opinion, given his orthopedic build, abdominal condition, degenerative disc disease and arthritic condition of his back. Dr. Haig has recommended against surgery given these facts. On 3/22/83, after seeing him at three week intervals since the 5/3/82 incident, Dr. Haig expressed the opinion no further treatment was indicated and he should change to a lighter job. It was around this point that the Claimant temporary total compensation based again on his July 12, 1978 $304.78 average weekly wage was terminated, with Dr. Haig's 4/6/83 report of maximum medical improvement and ability to return to employment not requiring heavy lifting.

Dr. Haig, who has continued to see Claimant regularly and monthly to date, continues of the opinion based on his clinical findings on examination: spasm, limited motion, sluggish reflexes, and cervical affects, that given his severe back injury of 7/12/78 and an aggravation of the Claimant's "pre-existing" arthritic condition, with additional degeneration evident on 1/1983 x-rays, he is able to perform light work only.

When Claimant was again seen by Dr. Cloud on 8/15/83 for a recommended evaluation following informal conference in 7/1983, the subject of which was the Claimant's continued disability as a result of the 7/12/78 injury, his opinion as to Claimant's orthopedic functional ability was similar to Dr. Haig's: he was precluded from the hard work activities of his shipyard job, Dr. Cloud attributing the Claimant's musculoskeletal symptomatology to arthritic degenerative changes he found in the Claimant's lumbar spine. (Claimant's Ex. 4). While the Claimant was again paid compensation benefits total in nature based on his 7/12/78 $304.78 average

weekly wage for the period 3/27/83 to 9/10/83, no compensation benefits have been paid thereafter to date.

Post 7/12/78 Events—Causation Issue Occurred in Course and Scope/Arose Out of

Dr. Haig's office notes in conjunction with Claimant's testimony establish that due to a distinct and discrete work incident on 5/3/82, while Claimant was exerting himself in connection with drip pan installation work, he did some lifting motion in close quarters which triggered his back into such severe distress he had to be again hospitalized, after six months of relative quiescence. While this was another exacerbation and aggravation of his back condition resulting from the 7/12/78 injury, this time his treating orthopedist determined he could not and should not return to his heavy, physically demanding shipfitter work. The clear import of Dr. Haig's statements over the years, as well as his testimony, is that this work over the years since 10/78 has been reaggravating the Claimant's 7/12/78 post-injury back condition; on a cumulative basis through the wear and tear of this heavy work on a back weakened and vulnerable due to the 7/12/78 injury's residuals and his underlying degenerative condition; as well as by discrete, distinct work incidents related to him by the Claimant after 10/78 and prior to 5/82, but most specifically described in his records as to the 5/3/82 incident, following which Dr. Haig's treatment notes carried 5/3/82 as the injury date.

According to Dr. Haig the post 7/12/78 incidents to a very small degree, perhaps 3-5%, on a permanent basis contributed to the extent of the Claimant's present disability. Even Dr. Cloud, who attributes his present symptomatology/limitations to his degenerative condition

rather than the 7/12/78 injury's residuals (Dr. Cloud was unaware of the subsequent, symptom-triggering discrete work events), opined the 1978 injury accelerated the progress of the underlying condition. The Claimant's 1979 and 1982 back x-rays as compared to 12/78 films reflect significant increases in the extent of degenerative deterioration.

Whether termed an aggravation, exacerbation or acceleration of the Claimant's back condition as it existed post 7/12/78 injury, it is clear from the total evidence that something went wrong within the Claimant's back on 5/3/82 due to work activities he engaged in that day, in addition to the cumulative total of stresses and strains he had been subjecting his back to during the course of his strenuous work activities for Gulfport since he returned to work the prior October. Weighing the totality of all the evidence on the issue respondents raised I believe it is unreasonable to find the post 7/12/78 work-cessating bank exacerbations/symptoms including those of 5/3/82 represent a progression of, or are related solely to the 7/12/78 injury's residuals; or are solely a progression of his underlying arthritis.

It is thus found that an injury within § 2(2)'s meaning occurred 5/3/82 during the course and scope of and arose out of his Gulfport employment. Based on the medical evidence in total on a permanent medical basis the 5/3/82 injury slightly increased the extent of disability resulting from the 7/12/78 injury. On an economic basis, considering the evidence in total, the 5/3/82 aggravation re-injury terminated the Claimant's ability to sustain his usual strenuous shipfitter work.

Nature/Extent of Disability

The record thus establishing that since 5/3/82 the Claimant has been precluded, by his 7/12/78 and 5/3/82 injurys' residuals, from performing his shipfitter work, the crucial issue in determining the extent of disability here is whether the vocational evidence the employer presented in order to meet its burden under the Act, *American Stevedores, Inc. v. Salzano,* 538 F.2d 933, demonstrates that suitable alternative employment opportunities within the Claimant's residual functional capacity post-injury exist; whether this record convinces of the general availability of realistic job opportunities within the geographic area where this Claimant resides which he by virtue of his age, education and work experience has the capability to perform or for which he could be trained within a reasonable period of time. *Pinkington v. Sun Shipbuilding and Dry Dock Company,* 9 BRBS 473.

Respondents presented the testimony of Alan G. Simpson, a vocational expert, to meet their vocational burden under this Act. It is, for the following reasons, found that this witness' testimony in no way persuades that this Claimant has a residual wage earning capacity post 5/3/82 injury, within those terms' meaning under this Act.

While the Claimant may well, despite Dr. Haig's observations and opinions as to his non-physical limitations in vocational readjustment, have some vocationally significant attributes from his shipyard welding work which would assist this middle aged Claimant in adjusting to the performance of sedentary to light work activities within his orthopedic residual capacity, and he obviously

is motivated for a return to work activities given his past history of return to shipyard work despite continuing credible symptomatology, Mr. Simmons who very recently became involved in this matter, made no labor market survey analyzing any available job openings within claimant's geographic area, for any of the jobs he cited as within the Claimant's residual functional capacity. The electronic assembler job he ran across in 3/84 was the only open job; whether it was presently open was unknown to him, and neither its performance requirements nor these of the nut and bolt job he referred to (in Houston?) were analyzed locally to determine if they were suitable to this Claimant, given his educational/vocational background, nor was it determined whether they were jobs for which he could be trained within a short period.

Besides finding this witness' testimony did not reflect the availability of any suitable alternative employment, and was poorly-founded given his recent and limited involvement, I also found his testimony highly speculative as to this particular Claimant, especially when the portrayal of this Claimant in his medical records, and how he appeared and impressed at hearing are weighed.

Thus it is found and concluded that respondents not having persuaded by their vocational evidence that this Claimant retains any wage earning capacity residual to the 7/12/78 injury affected by the 5/3/82 injury, he is found to be totally disabled since 5/3/82. It is so found and concluded.

Permanency Date

A temporary disability within the Act's meaning is defined as being one in which maximum medical improve-

ment has not been reached; or where the Claimants' condition has lasted for a lengthy or an indefinite duration, and appears to be continual, *Watson v. Gulf Stevedore Corporation*, 400 F.2d 649.

While a 56/82 permanency date was proposed at trial, review of Dr. Haig's treatment records in my opinion, establishes and persuades that following the 5/3/82 recurrence of acute, and once again stronger back symptomatology, it took a more protracted period of time to bring the Claimant, with treatment and watchful medical care, to the point where his back condition was again medically stable. Given the medical treatment history this record reflects as to the course of this Claimant's medical progress with each of the incidents for which Dr. Haig treated him over the years, despite Dr. Haig's indication first that maximum medical improvement was never achieved (12/82), his 4/6/83 opinion of such, and then in his testimony that it existed as of 5/3/82 (pg. 28), I believe that following a period of several months of treatment over the summer/fall of 1982, with no significant improvement, Dr. Haig's 11/12/82 examination is a reasonable point for determining permanency, the condition post 5/3/82 having continued for a lengthy period, and it then appearing it would so continue indefinitely at such a level.

It is thus found and concluded that his total disability became permanent in nature 11/12/82, and he is found entitled to all § 10(f) adjustments thereafter.

A temporary disability within this Act's meaning is determined in the context of the above definition. Vocational rehabilitation, or retraining of this Claimant for jobs within his post-injury residual physical capacity while

relevant on the issue of the extent of disability, do not determine the issue of whether his disability is permanent or temporary in nature.

Compensation Amounts—Average Weekly Wage 5/3/82.

In determining the amount of compensation benefits payable as a result of the above findings the extent to which the Claimant's wage earning capacity was affected by the 7/12/78 injury, and this injury's affect on his wage earning capacity prior to the 5/3/82 injury, must be found. *Morgan v. Marine Corps. Exchange,* 10 BRBS 442. Further it is essential in determining 5/3/82 post-injury wage earning capacity that a finding first be made both as to actual annual earnings 5/3/82 and annual earnings capacity as of 5/3/82.

The weekly payroll evidence submitted establishes that in the year prior to 5/2/83 injury, the Claimant was paid $17,555.18 for his 41 weeks of work reported, substantially the whole of the year despite his two months absence due to his 8/5/81 to 10/12/81 exacerbation. However, based on his hours worked he was neither a five day or a six day worker, his weekly hours varying throughout this period. Thus I find §§ 10(a) and 10(b) inappropriate for a § 10 computation and compute under § 10(c) to find that $22,821.00 is a reasonable representation of his annual earning capacity under § 10(c) when this computation is adjusted for his two months loss of earnings due to his exacerbation and the half week earnings represented by two of the work weeks included in this computation.

Applying § 10(d) to these $22,821.00 average annual earnings it is found and concluded that Claimant's average weekly wage at 5/3/82 injury was $438.86.

Prior to the 5/3/82 injury despite all of the many exacerbations of his 7/12/78 back condition, after extensive treatment care following each occurrence the Claimant was able to return to his shipfitter work and sustain these job activities at his usual wage for extended periods, albeit with pain and discomfort to which he accommodated. However, while he continued to earn his usual shipfitter wages after his return to work following 7/12/78 injury, with a 15% whole man impairment, the history of the Claimant's medical care and treatment over the years thereafter and prior to 5/3/82; as well as his testimony as to the condition of his back with which he worked, it is found that these post 7/12/78 wages do not fairly and reasonably represent his post-injury wage earning capacity which was significantly reduced by the 7/12/78 injury and what its residuals portended for the future. The *Devillier v. National Steel and Shipbiulding Co.,* 10 BRBS 649 factors must be considered here, where we have the benefit of a retrospective analysis, a number of years after his 10/78 return to work, with the established facts as to the severe economic effect the 12/78, 10/79, 4/80, and 8/81 exacerbations of the 7/12/78 injury's residuals had on his work activities. There was significant losses of work time each of these years. Considering the extent of medical impairment opined, his age at 7/12/78 injury, his occupational background and what the clear tenor of, and inferences from Dr. Haig's pre 5/3/82 reports portended for the future with the continued impact of strenuous work activity on a back weakened and affected by the 7/12/78 injury's affect on his underlying degenerative condition, the speculation usually involved in a determination as to the future effect of an injury's residuals is made less so by the facts reflected here as to post 7/12/78 events.

Upon consideration of the total evidence it is found and concluded that post 7/12/78 injury this Claimant on a permanent basis retained but of three-quarters of his pre injury earnings capacity. Thus his wage earning capacity before the 5/3/82 injury but after the 7/12/78 injury was $329.13 in 1982 dollars.

It is therefore found and concluded that as a result of the 7/12/78 injury this Claimant retained a $228.58 wage earning capacity, lost $76.20 in his wage earning capacity, and suffered a permanent partial disability in such capacity prior to 5/3/82 injury as to compute to a $50.80 compensation rate weekly. The 5/3/82 injury totally destroyed his remaining wage earning capacity as effected by the 1978 injury, which as of 5/3/82 was $329.13 weekly. The compensation rate for the 5/3/82 injury computed on this lost earning capacity is 2/3 thereof or $219.44 weekly.

It is thus found and concluded that effective 11/12/82 the Claimant is entitled to total permanent disability compensation of $270.24 weekly, $50.80 weekly based on the 7/12/78 injury and $219.44 weekly based on the 5/3/82 injury.

Section 8(f)

In order to apply § 8(f) to the 7/12/78 injury, and 5/3/82 injury respectively the evidentiary record must show that: (1) the Claimant had an existing permanent partial disability prior to the 7/12/78 injury and prior to the 5/3/82 injury; (2) such disability was manifest to respondent; (3) the permanent partial disability resulting from the 7/12/78 injury (prior to 5/3/82) was materially and substantially increased by the pre-existing permanent partial disability; and (4) the Claimant's

current total disability is not due solely to the 5/3/82 injury but results from a combining of his pre-existing disability (ies) with his disability residual to the industrial injury at issue, 5/3/82, *Dillingham Corp. v. Massey,* 505 F.2d 1126; *C & P Telephone Co. v. Director, OWCP,* 564 F.2d 502.

Based on the record as presented, on the 7/12/78 injury claim before me, there is no basis for affording § 8(f) relief. Both Dr. Cloud and Dr. Haig by their testimony and x-rays have established that the Claimant had, pre-existing 7/12/78, degenerative disc disease and arthritis of his spine, and it is this pre-existing permanent partial disability which combines with and was acted upon, aggravated and triggered into symptomatology by the 7/12/78 injury. However this disability was not, from what is presented, manifest to respondents prior to 7/12/78. It is therefore found and concluded that § 8(f) does not apply to respondents' compensation liability on the 7/12/78 injury.

Respondents need the occurrence of subsequent injuries to make viable a § 8(f) claim against the Special Fund. While Dr. Haig on 1/17/83 advised respondents that given the nature of shipyard work it would be very difficult not to say back injuries/reaggravations of his 7/12/78 injury were superimposed on this injury's residuals by his return to shipyard work (cumulative trauma over time) or were new injuries, he then attributed all of the Claimant's permanent residuals to the 7/12/78 injury. However review of Dr. Haig's testimony in totality and in conjunction with review of his medical reports/records/statements over time does, in my opinion, indicate and establish that injury subsequent to 7/12/78 resulted in permanent increases in his back disability

as a result of these aggravations: opining "a very small degree," "perhaps 3-5 percent". It was however this small degree of increased impairment resulting from the 5/3/82 injury which in actual permanent effect resulted in the totality of his disability as found, his inability to return to shipyard work.

Under these circumstances, it is found and concluded based on the record in totality, including Dr. Haig's opinion, that § 8(f) applies to respondents' compensation liability on the 5/3/82 injury.

Attorney Fees

Claimant's counsel's fee petition requesting $6,250.00 for 50.50 hours of legal services rendered since referral to this Office has been received, plus $790.51 in costs. Respondents have not advised they object to the petitioned fee. Therefore the fee requested is approved, plus costs.

All computations provided herein are to be made by the Deputy Commissioner in accordance with the terms of this decision and order and applicable provisions of the Act and regulations. All computations herein are subject to verification by the Deputy Commissioner.

ORDER

Based on the above findings of fact and resulting conclusions of law, it is hereby ordered that;

1. Effective 5/6/82 and through 11/11/82 the respondents shall pay the Claimant weekly temporary total disability compensation benefits based on his $438.86 average weekly wage at 5/3/82 injury.

2. Effective 11/12/82 respondents shall pay the Claimant permanent total compensation benefits of $270.-24 weekly based on the 5/3/82 injury, with all § 10(f) adjustments thereafter.

3. Respondents shall continue liable for this total permanent disability compensation rate weekly for 104 weeks from 11/12/82. Thereafter the payment of $219.44 of this weekly permanent compensation rate for 5/3/82 injury shall be the responsibility of the Special Fund pursuant to § 8(f), 33 U.S.C. § 944. The difference in the total permanent compensation benefits due Claimant continue as Respondents liability resulting from the 7/12/78 injury.

4. Respondents shall be credited for all amounts previously paid.

5. Interest shall be paid on all compensation amounts due and unpaid as a result of this Order.

6. Respondents shall pay Claimant's counsel, Richard M. Schechter, Esquire, $7,040.51 as a legal fee plus costs for all services rendered at this level.

7. Pursuant to § 702.502 the Director's attention for any further action is called to the indication in this record that vocational rehabilitation may be appropriate here.

/s/ ELLIN M. O'SHEA
Ellin M. O'Shea
Administrative Law Judge

Dated: September 14, 1984
Washington, D.C.
EMO/yw

CERTIFICATE OF FILING AND SERVICE

I certify that on September 27, 1984 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Eighth District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Leroy Jackson; 1128 East 15th Street;
Port Arthur, TX 77640
Claimant

Richard Schechter, atty; 525 Webster;
Houston, TX 77002

Gulfport Shipbuilding Co.; P. O. Box D;
Port Arthur, TX 77640

Texas Employers' Insurance Assn.; P. O. Box 5410;
Beaumont, TX 77706
Insurance Carrier or Employer (if self-insured)

John Cash Smith, atty; P. O. Box 189;
Orange, TX 77630

* DECISION AND ORDER — AWARDING BENEFITS dated September 14, 1984.

A copy was also mailed by regular mail to the following:

Judge Ellin M. O'Shea, Office of Administrative Law Judges, U. S. Department of Labor,
1111 20th Street
Washington, D.C. 20036

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA)
U. S. Department of Labor,
Washington, D.C. 20211

/s/ JAMES T. SMITH
James T. Smith
Deputy Commissioner
Eighth Compensation District
U. S. Department of Labor
Employment Standards Adm.
Office of Workers' Compensation Programs

Part 9: Mr. Jackson's Second Amended Original Petition

NO. B-119,836

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

LEROY JACKSON

v.

TEXAS EMPLOYERS' INSURANCE
ASSOCIATION

PLAINTIFF'S SECOND AMENDED
ORIGINAL PETITION

To The Honorable Judge Of Said Court:

COMES NOW LEROY JACKSON, hereinafter referred to as Plaintiff, continuing to complain of TEXAS EMPLOYERS' INSURANCE ASSOCIATION, hereinafter referred to as Defendant, and for cause of action would respectfully show unto this Honorable Court as follows:

I.

Plaintiff is a resident of Jefferson County, Texas.

Defendant is an insurance company which has previously been served with process.

II.

On or about July 12, 1978, Leroy Jackson seriously injured his back and leg while working at the Gulfport Shipbuilding Shipyard. As a result of this injury Leroy Jackson received extensive medical care from Defendant's

orthopedic surgeon, Dr. Martin Haig. Between July 1978 and May 1982, Mr. Jackson was hospitalized on several occasions for his back injury. During that time, he was also released to return to work on several occasions by Dr. Haig, and did in fact return to work. In May 1982 the pain in Mr. Jackson's back got so bad that he went back to see Dr. Haig. Dr. Haig took him off work at that time and has kept Leroy Jackson off work ever since then.

Defendant Texas Employers' Insurance Association is the insurance company that provided coverage pursuant to the Longshoreman and Harbor Workers' Compensation Act for Leroy Jackson's employer at the time of Mr. Jackson's injury. Leroy Jackson is a third-party beneficiary of this contract. It was Texas Employers' Insurance Association's duty under the Longshoreman & Harbor Worker's Compensation Act to pay Leroy Jackson disability benefits.

In late 1982 Defendant recognized that Mr. Jackson's case was a substantial case and Defendant faced tremendous exposure.

In early 1983 Texas Employers' Association, its agents, servants and/or employees, decided that it was going to put the squeeze on Leroy Jackson in an effort to force him to settle his case for less than he was entitled to. They decided to look for a way to cut off his worker's compensation benefits.

At some point in time in early 1983, Barbara Beasley, an insurance adjuster for Texas Employers' Insurance Association, called Dr. Martin Haig, at the request of her superiors. She told Dr. Haig that if he stated Leroy Jackson had reached maximum medical improvement, she

would be able to settle the case with Mr. Jackson. Dr. Haig said that he would be willing to state that Leroy Jackson had reached maximum medical improvement, but only on the assurance that Texas Employers' Insurance Association would not terminate Mr. Jackson's worker's compensation payments. Ms. Beasley gave him that assurance, and Dr. Haig wrote a medical narrative stating that Leroy Jackson had reached maximum medical improvement. Upon receipt of that narrative Texas Employers' Insurance Association, through its agents, servants and/or employees, cut off Leroy Jackson's compensation.

Dr. Haig made this devious action public in a medical narrative. A conference was held before the Department of Labor and, after many weeks of not paying benefits, Defendant Texas Employer's Insurance Association agreed to pay compensation benefits until the case was resolved.

At the time Defendant made this agreement, it had no intention of paying benefits. Defendant set up a doctor's appointment for Plaintiff with Defendant's "choice of physician", Dr. James Cloud, with the express intent of again terminating Mr. Jackson's benefits, regardless of what Dr. Cloud said. Mr. Jackson kept his appointment with Dr. Cloud and, upon receipt of the narrative, Defendant terminated Plaintiff's compensation benefits. These benefits remained unpaid until an Administrative Law Judge ordered them paid in June 1984. At no time during the course of the termination of the benefits did Defendant ever have a valid basis or reason for shutting off Mr. Jackson's compensation payments.

Leroy Jackson has nothing more than a grade school education and his treating physician indicated that he was

unable to to obtain any type of employment. Dr. Haig continued to indicate this fact, even when Mr. Jackson's benefits were cut off. The sole and clear purpose of the move by Texas Employers' Insurance Association was to place the squeeze on Plaintiff Leroy Jackson and force him to settle his case for less than it was worth. The screws were especially tight since Leroy Jackson has a family and his compensation benefits were the sole source, at that time, of income that he had for himself and his family. The termination of these benefits has caused him severe anxiety and caused him to enter into a severe state of depression. It has damaged his relationship with his family and has placed tremendous pressure on both he and his family members. It has forced Leroy Jackson to endure substantial mental anguish, stress, anxiety and humiliation.

CAUSE OF ACTION NUMBER ONE

III.

Plaintiff brings this cause of action pursuant to the provision of the Texas Insurance Code, Article 21.21, *et seq*. The acts and practices of Defendant as described in this Original Petition were prohibited by the Texas Insurance Code, Article 21.21.

IV.

At all times relevant to this suit Plaintiff was a "person" as defined in Article 21.21, Section 2(a) of the Texas Insurance Code.

At all times relevant to this suit Defendant was a "person" as defined in Article 21.21, Section 2(a) of the Texas Insurance Code and was engaged in the business of insurance in Jefferson County, Texas.

V.

The practices of Defendant as described in this Original Petition were false, misleading, unfair and/or deceptive under Article 21.21 of the Texas Insurance Code. These unlawful acts and practices adversely affected Plaintiff and were the producing cause as well as the proximate cause of the damages that Plaintiff incurred. Plaintiff seeks to recover that amount of money which, if paid in cash, would fairly and reasonably compensate him for his damages. The damages total an amount that exceeds the minimum jurisdictional limits of this Court.

VI.

TO THE COURT ONLY

Pursuant to Article 21.21, Section 16(b)(1) of the Texas Insurance Code, Plaintiff is entitled, as a matter of law, to obtain from Defendant three times the amount of actual damages sustained as a result of Defendant's unlawful conduct and Plaintiff pleads to the Court that such treble damages be awarded as a matter of law.

CAUSE OF ACTION NUMBER TWO

VII.

This suit is also filed pursuant to the provisions of the Texas Business and Commercial Code, Section 17.41, *et seq.* [The Deceptive Trade Practices-Consumer Protection Act] as amended in 1981, upon the grounds that the acts and practices of Defendant described in this Petition are prohibited by this statute.

VIII.

Plaintiff is a consumer as that term is defined in Section 17.45(4) of the Deceptive Trade Practices-Consumer Protection Act.

At all times material to this suit, Defendant was engaged in "trade" and "commerce" as defined in Section 17.45(6) of the Deceptive Trade Practices-Consumer Protection Act, in Jefferson County, Texas.

IX.

Plaintiff incorporates by reference all of the allegations previously stated in this Petition. The practices of the Defendant and the conduct of their trade, as described above in this Petition, were false, misleading or deceptive acts or practices and therefore unlawful under the Deceptive Trade Practices-Consumer Protection Act.

X.

As defined in Section 17.45(9), Defendant violated the Texas Deceptive Trade Practices-Consumer Protection Act "knowingly".

XI.

The unlawful acts and practices described above adversely affected Plaintiff and was a producing cause, as well as a proximate cause, of the damages that Plaintiff incurred. Plaintiff seeks to recover the amount of money which, if paid in cash, would fairly and reasonably compensate him for his damages. These damages total an amount that exceeds the minimum jurisdictional limit of this Court.

On June 6, 1983, Plaintiff presented the claim described above to Defendant by letter mailed Certified Mail, Return Receipt Requested. [See Exhibits A, B and C, letters to Mr. O. V. McDonald, Ms. Barbara Beasley and Mr. Charlie Fant]. In that letter Plaintiff demanded payment of a specific sum. At the time of the filing of this Petition, which is over thirty (30) days from the date of demand for payment, payment for the just amount owed has not been tendered. As a result of Defendant's failure to pay the claim or abide by its duty under law, Plaintiff has been required to retain legal counsel to bring this suit.

XII.

TO THE COURT ONLY

Pursuant to Section 17.50(b)(1) of the Deceptive Trade Practices-Consumer Protection Act, as amended in 1981, Plaintiff is entitled, as a matter of law, to obtain from Defendant two times that portion of the actual damages that does not exceed ONE THOUSAND DOLLARS ($1,000.00).

Additionally, if the trier of fact finds that the conduct of the Defendant was committed knowingly, Plaintiff respectfully prays that as a matter of law the damages awarded by the trier of fact in excess of ONE THOUSAND DOLLARS ($1,000.00) be trebled.

CAUSE OF ACTION NUMBER THREE

XIII.

This suit is also filed to seek redress for Defendant's bad faith insurance practices.

XIV.

Plaintiff hereby incorporates by reference all the allegations of this Original Petition. As a result of Defendant's conduct Plaintiff has suffered severe damages. Defendant's conduct was clearly committed in bad faith in an effort to place a squeeze on Plaintiff Leroy Jackson and force him to accept a lower settlement. Defendant's conduct was committed in bad faith.

XV.

As a result of this bad faith denial of his rights, Plaintiff Leroy Jackson has sustained substantial damages, as have been enumerated above. These damages that Plaintiff has suffered exceed the minimum jurisdictional limits of this Court.

CAUSE OF ACTION NUMBER FOUR

XVI.

Defendant, its agents, servants and/or employees committed the tort of fraud. They misrepresented material facts to a variety of people, these misrepresentations were relied on and they were relied on to the detriment of Leroy Jackson. These misrepresentations were intentional and designed to defraud Leroy Jackson of his rights under the Longshoreman & Harbor Worker's Compensation Act and his compensation benefits. These acts were the cause of substantial damages to Leroy Jackson, damages in excess of this Court's minimum jurisdiction.

CAUSE OF ACTION NUMBER FIVE

XVII.

Defendant, its agents, servants and/or employees have committed the tort of intentional infliction of emotional distress. They intentionally took steps and actions designed to cause emotional harm and duress to Leroy Jackson. These acts and steps were specifically aimed at defrauding Leroy Jackson of his rights under the Longshoreman & Harbor Worker's Compensation Act and placing tremendous pressure on Leroy Jackson so that he would be forced to settle his case. Each and every one of the steps that Defendant, its agents, servants and/or employees took was a proximate cause of severe emotional distress suffered by Leroy Jackson.

CAUSE OF ACTION NUMBER SIX

XVIII.

Defendant, its agents, servants and/or employees, negligently inflicted emotional distress on Leroy Jackson. They took acts or steps which they knew or should have known would cause Leroy Jackson's severe emotional distress. They negligently took these steps in an effort to deny Leroy Jackson compensation benefits rightfully due to him under the Longshoreman & Harbor Worker's Compensation Act. The steps that each and every one of the individuals took did cause Plaintiff Leroy Jackson severe and damaging emotional distress. Plaintiff comes now and sues for damages in excess of this Court's minimum jurisdiction for said injuries.

CAUSE OF ACTION NUMBER SEVEN

XIX.

The conduct of Defendant, its agents, servants and/or employees was wilful and wanton and displayed a lack of care and concern for the health, safety and welfare of others. Defendant, as a result of this conduct, is liable for exemplary damages.

Defendant should be held liable for exemplary damages, in addition to Plaintiff's actual damages, in a sum in excess of this Court's minimum jurisdiction.

DAMAGES

XX.

As a result of Defendant's conduct, Plaintiff has suffered substantial damages. Plaintiff brings this suit to recover actual damages of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00) and punitive damages in the sum of FIFTEEN MILLION DOLLARS ($15,000,000.00).

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant be cited in terms of law to appear and answer herein, and that upon final trial hereof, Plaintiff have judgment against Defendant for actual damages of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000.00), punitive damages of FIFTEEN MILLION DOLLARS ($15,000,000.00), with interest on all at the legal rate, pre-judgment interest, for costs of Court in this behalf expended, and for such other and further relief, special and general, at law or

in equity, to which Plaintiff may show himself justly entitled.

Respectfully submitted,

/s/ RICHARD SCHECHTER
Richard Schechter
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525 Webster
Houston, Texas 77002
(713) 757-7811
Bar No. 17735500

Of Counsel:

SCHECHTER, EISENMAN & SOLAR

PLAINTIFF DEMANDS A TRIAL BY JURY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Second Amended Original Complaint has been forwarded to counsel of record for Defendant, via certified mail, return receipt requested, on this 24th day of May, 1985.

/s/ RICHARD SCHECHTER
Richard Schechter